

BRB No. 06-0337 BLA

WILLIAM HERCULES)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CONSOLIDATION COAL COMPANY)	DATE ISSUED: 01/26/2007
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order on Second Remand – Denying Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Timothy F. Cogan (Cassidy, Myers, Cogan & Voegelin, L.C.), Wheeling West Virginia, for claimant.

William S. Mattingly (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Second Remand – Denying Benefits (2001-BLA-0469) of Administrative Law Judge Michael P. Lesniak 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). This case is before the Board for the third time.¹ When the case was most recently before the Board, the Board

¹ The relevant procedural history of this case was fully and accurately set forth in the Board's 2003 Decision and Order. *Hercules v. Consolidation Coal Co.*, BRB No. 02-0541 BLA, slip op. at 2-3, n.3 (May 2, 2003)(unpub.).

vacated the administrative law judge's award of benefits. *Hercules v. Consolidation Coal Co.*, BRB No. 04-0212 BLA (Dec. 28, 2004)(unpub.). In vacating the award of benefits, the Board held that while the administrative law judge properly found that Dr. Cohen's opinion, attributing claimant's lung disease to both coal mine employment and cigarette smoking, was well-documented and reasoned, the administrative law judge failed to adequately explain his weighing of contrary opinions, and in particular the opinions of Drs. Fino and Altmeyer. Specifically, the Board held that the administrative law judge erred in rejecting the opinions of Drs. Fino and Altmeyer for the reason that those doctors had relied on the absence of physical findings of clinical pneumoconiosis, in order to rule out the existence of legal pneumoconiosis. Consequently, the Board held that the administrative law judge did not provide a sufficient explanation for his weighing of those opinions and the Board remanded the case for the administrative law judge to reconsider those opinions along with the other relevant medical opinion evidence at Section 718.202(a)(4). *Hercules*, BRB No. 04-0212 BLA, *slip op.* at 6. The Board further instructed the administrative law judge that, if he again determined that the newly submitted medical opinion evidence established the existence of pneumoconiosis, he must weigh together all of the newly submitted evidence relevant to the existence of pneumoconiosis, 20 C.F.R. §718.202(a)(1)-(4) before determining whether the existence of pneumoconiosis was established. *Hercules*, BRB No. 04-0212 BLA, *slip op.* at 7; *see Island Creek Coal Co. v. Compton*, 211 F.3d 303, 22 BLR 2-162 (4th Cir. 2000). In addition, the Board vacated the administrative law judge's finding that a material change in conditions was established at 20 C.F.R. §725.309 (2000) because that determination was based on his finding that the newly submitted evidence established the existence of pneumoconiosis. *Id.* The Board also vacated the administrative law judge's finding that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) as that determination was based on his finding of pneumoconiosis. *Id.*

On remand, the administrative law judge again found that the weight of the newly submitted opinions failed to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). The administrative law judge maintained his earlier finding that the opinions of the pathologists, Drs. Bush, Caffrey and Green, failed to address the existence of legal pneumoconiosis. The administrative law judge further maintained that the opinion of Dr. Branscomb was not entitled to much weight because it was not as well documented as the opinion of Dr. Cohen. Regarding the opinion of Dr. Fino, including the doctor's pertinent deposition testimony, the administrative law judge found it to be well-documented and reasoned as Dr. Fino persuasively explained why he discounted coal mine employment as a cause of claimant's lung disease and adequately addressed Dr. Cohen's criticism. Concerning Dr. Altmeyer's opinion, while the administrative law judge found it to be well-documented, he did not find it to be as well-reasoned as the opinions of Drs. Cohen and Fino because, while Dr. Altmeyer was aware of claimant's coal mine employment and smoking histories, he never discussed either one in sufficient detail when he attributed claimant's lung disease to smoking.

Considering the newly submitted opinions together, the administrative law judge concluded that the opinions of Drs. Fino and Cohen outweighed the others. However, inasmuch as he found these opinions to be entitled to equal weight, he found that claimant failed to meet his burden of establishing, by a preponderance of the evidence, that he had legal pneumoconiosis. Further, in weighing the relevant evidence together, 20 C.F.R. §718.202(a)(1)-(4) pursuant to *Compton*, 211 F.3d 303, 22 BLR 2-162, the administrative law judge found that it did not support a finding of the existence of pneumoconiosis pursuant to Section 718.202(a). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of legal pneumoconiosis. Claimant also alleges that the documents submitted by Dr. Fino were excessive, unduly repetitious, and exceeded the evidentiary limitations at 20 C.F.R. §725.414. In addition, claimant challenges several of the holdings made by the Board in its earlier decision. Employer responds, urging that the administrative law judge's decision on remand be affirmed. The Director, Office of Workers' Compensation Programs, (Director) is not participating in this appeal.

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. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant argues that, in considering the newly submitted physicians' opinions, the administrative law judge erred in failing to consider the relative weight of the physicians' qualifications, and erred in failing to address "other factors" such as physician bias. Claimant's Brief at 3. In particular, claimant contends that while both Drs. Fino and Cohen are Board-certified in pulmonary diseases, Dr. Cohen has additional qualifications, such as: being the head of pulmonary medicine departments and laboratories, being an assistant professor in medicine, and being the author of numerous publications regarding occupational lung disease, which should have entitled his opinion to greater weight. In addition, claimant contends that Dr. Cohen was cited as an expert in the preamble to the new regulations while Dr. Fino's opinions were specifically rejected in that preamble. Thus, claimant contends that the administrative law judge should not have found the opinions of Drs. Cohen and Fino to be in equipoise, but should have accorded greater weight to the opinion of Dr. Cohen based on his additional qualifications and the fact that he presented a "more balanced and scholarly view" of the evidence. Claimant's Brief at 7.

In this case, the administrative law judge recognized that both Dr. Fino and Dr. Cohen possessed Board-certifications in internal and pulmonary medicine. The administrative law judge found that both doctors had thoroughly reviewed and considered

the relevant evidence of record. The administrative law judge considered their Board-certifications, and was aware of the fact that they had reviewed various scientific literature relevant to legal pneumoconiosis. The administrative law judge was not required to give Dr. Cohen's opinion added weight for the reason set forth by claimant. *See Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990)(*en banc*) (while the administrative law judge may accord greater weight to a physician's opinion based on that physician's superior qualifications, he is not required to do so); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Thus, the administrative law judge's failure to accord greater weight to Dr. Cohen than to the opinion of Dr. Fino does not constitute error and we reject claimant's assertions in this regard. Decision and Order on Second Remand at 17; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996) (credibility of medical opinion is for administrative law judge to determine); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Clark*, 12 BLR at 1-155.

Claimant further argues that the opinion of Dr. Branscomb is supportive of a finding of legal pneumoconiosis pursuant to Section 718.202(a)(4), as the physician's statement that further coal mine employment would worsen claimant's condition was sufficient to support such a determination. Contrary to claimant's assertion, however, Dr. Branscomb specifically stated that there was no objective evidence of coal worker's pneumoconiosis, and that while claimant suffered from an obstructive disease, that disease was not caused by or aggravated by coal dust exposure. The physician further ruled out the existence of emphysema related to coal mine dust exposure. Accordingly, contrary to claimant's assertion, Dr. Branscomb's opinion does not buttress Dr. Cohen's opinion, and is not supportive of claimant's case. *See* 20 C.F.R. §718.201(a).

We further reject claimant's assertion that the opinions of employer's physicians are hostile to the Act. Claimant contends that Drs. Fino, Altmeyer and Branscomb all rendered opinions that were "colored by party affiliation," Claimant's Brief at 28, and made no effort to offer an objective opinion. Contrary to claimant's assertion, however, and as discussed above, the administrative law judge properly found that these opinions were based on a review of the evidence of record and claimant has failed to provide any support for his contention that the physicians were biased. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *see also Stiltner*, 86 F.3d 337, 20 BLR 2-246, (4th Cir. 1996); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995).

Moreover, we need not address claimant's challenges to previous holdings of the Board as claimant failed to previously challenge them. *See Gillen v. Peabody Coal Co.*, 16 BLR 1-22, 1-25 (1991); *Bridges v. Director, OWCP*, 6 BLR 1-988, 1-989 (1984); *see*

also *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-151 (1990), *rev'd on other grounds, Peabody Coal Co. v. Brinkley*, 972 F.2d 880, 16 BLR 2-129 (7th Cir. 1992).

Ultimately, the disposition of this case turns on whether substantial evidence supports the administrative law judge's determination that the medical opinion of Dr. Fino is entitled to equal weight to that of Dr. Cohen. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999) stated that: "to overturn the ALJ, we would have to rule as a matter of law that 'no reasonable mind' could have interpreted and credited the doctor's opinion as the ALJ did. That we cannot do." *Mays*, 176 F.3d at 763, 21 BLR at 2-606. Accordingly, because we find the administrative law judge's consideration of the evidence to be reasonable, we cannot say that the administrative law judge erred. *Mays*, 176 F.3d 753, 21 BLR 2-587.

We, therefore, affirm the administrative law judge's determination that the newly submitted medical opinion evidence does not support a finding of the existence of pneumoconiosis pursuant to Section 718.202(a)(4), *see* 20 C.F.R. §718.201; *Ondecko*, 512 U.S. 267, 18 BLR 2A-1. In addition, we affirm the administrative law judge's determination that the newly submitted evidence, when weighed together with other new evidence relevant to the existence of pneumoconiosis, fails to support a finding of the existence of pneumoconiosis pursuant to Section 718.202(a). *See Compton*, 211 F.3d 303, 22 BLR 2-162. Further, contrary to claimant's contention, in reaching this determination, the administrative law judge found that, in addition to his finding that the evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), he had previously determined that the evidence of record failed to support a finding of pneumoconiosis pursuant to Section 718.202(a)(1)-(a)(3), and that finding was affirmed by the Board. *Hercules v. Consolidation Coal Co.*, BRB No. 02-0541 BLA, *slip op.* at 7 n.8. *See Gillen*, 16 BLR at 1-25; *Brinkley*, 14 BLR at 1-150-151; *Bridges*, 6 BLR at 1-989.

Finally, claimant contends that the three examinations, three reports and two depositions of Dr. Fino are excessive and unduly repetitious and that they exceed the evidentiary limitation imposed by 20 C.F.R. §725.414. Contrary to claimant's assertion, Section 725.414 is not applicable to this duplicate claim which was filed on September 28, 1999. 20 C.F.R. §§725.2, 725.414; *see Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004). Moreover, review of the administrative law judge's Decision and Order on Second Remand demonstrates that the administrative law judge based his opinion on only the newly submitted opinion of Dr. Fino, Director's Exhibit 24A, and that physician's deposition testimony, Director's Exhibit 13A. The administrative law judge did not, therefore, err in considering the newly submitted opinion. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997).

Hence, as the administrative law judge has properly found that the newly submitted evidence has failed to establish the existence of pneumoconiosis, claimant is precluded from establishing a material change in conditions. 20 C.F.R §725.309 (2000); *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). Because claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement pursuant to 20 C.F.R. Part 718, *see Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (*en banc*), entitlement is precluded.

Accordingly, the administrative law judge's Decision and Order on Second Remand - Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge