BRB No. 10-0278 BLA

EDWARD C. MERRILL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MANALAPAN MINING COMPANY	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 01/26/2011
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

James W. Herald, III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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 - Awarding Benefits (2007-BLA-05730) of Administrative Law Judge Kenneth A. Krantz rendered on a subsequent claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). The administrative law judge accepted the parties' stipulation that claimant worked in qualifying coal mine employment for twenty-three years and adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the x-ray evidence developed since the denial of claimant's previous claim was sufficient to establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Based on all of the evidence of record, the administrative law judge found that the x-ray and medical opinion evidence established the existence of clinical pneumoconiosis[2] arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b). The administrative law judge further found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(ii), additionally noting that all of the physicians concluded that claimant is totally disabled. Furthermore, the administrative law judge found that claimant's total disability is 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 weighing of the evidence in finding the existence of pneumoconiosis and a change in the applicable condition of entitlement established pursuant to 20 C.F.R. §§718.202(a)(1) and 725.309(d). Employer also contends that the administrative law judge erred in finding total disability due to pneumoconiosis established pursuant to 20 C.F.R. §718.204(c).

[1] Claimant's first claim for benefits, filed on February 5, 2001, was denied by Administrative Law Judge Mollie W. Neal on May 7, 2004, because, while claimant established total disability, the evidence was insufficient to establish the existence of pneumoconiosis or total disability due to pneumoconiosis. Director's Exhibit 1. Pursuant to claimant's appeal, the Board affirmed the denial of benefits. *Merrill v. Manalapan Mining Co.*, BRB No. 04-0720 BLA (Apr. 26, 2005)(unpub.). Claimant filed his current claim on July 24, 2006. Director's Exhibit 3.

[2] Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconiosis, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive response 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.[3] 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).

In order to establish entitlement to benefits in a 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, that he is totally disabled and that his total disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

When a miner files an application 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). Claimant's prior claim was denied because he failed to establish the existence of pneumoconiosis. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing this condition of entitlement in order for the administrative law judge to consider the merits of his claim. *See* 20 C.F.R. §725.309(d)(2), (3); *White*, 23 BLR at 1-3.

Employer argues that the administrative law judge erred in finding that claimant established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Specifically, employer contends that the administrative law judge erred in finding that the newly submitted x-ray evidence differed qualitatively from the x-ray evidence submitted in conjunction with the prior claim, and that it was sufficient to establish the existence of pneumoconiosis. We disagree.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 1.

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered eight readings of four films dated September 18, 2006, October 30, 2006, January 25, 2007 and July 7, 2008, of which there were four positive and three negative readings for pneumoconiosis.[4] Decision and Order at 7-8, 25-26. The administrative law judge explained the weight he accorded to the conflicting readings. He found that the September 18, 2006 x-ray was negative for pneumoconiosis because the sole reading of this x-ray, by Dr. Broudy, a B reader, was negative. *Id*. at 25; Director's Exhibit 18. The administrative law judge found that the evidence pertaining to the October 30, 2006 x-ray was in equipoise because the x-ray was read as positive for pneumoconiosis by Dr. Rasmussen, a B reader, and by Dr. Alexander, a Board-certified radiologist and B reader, and as negative for pneumoconiosis by Dr. Wheeler, a Board-certified radiologist and B reader. Decision and Order at 25; Director's Exhibit 14; Claimant's Exhibit 3; Employer's Exhibit 2. The administrative law judge next found that the January 25, 2007 x-ray was read as positive for pneumoconiosis by Dr. Alexander, and as negative for pneumoconiosis by Dr. Jarboe, a B reader. Decision and Order at 26; Director's Exhibit 21; Claimant's Exhibit 4. Because the administrative law judge considered Dr. Alexander to be better qualified, he determined that the January 25, 2007 x-ray was positive for the existence of pneumoconiosis. Decision and Order at 26. The administrative law judge further found that the July 7, 2008 x-ray was positive for pneumoconiosis, based on the sole positive reading of this x-ray by Dr. Vaezy, a B reader. *Id*.; Claimant's Exhibit 5. Thus, the administrative law judge concluded that the x-ray evidence consists of "two x-rays with positive results, one x-ray with a negative result, and one x-ray in equipoise." Decision and Order at 26.

In weighing the x-ray evidence, the administrative law judge noted that, with regard to the prior claim, there were eleven readings of six x-rays and that "all of the positive interpretations [for pneumoconiosis] were made by physicians with no special radiological qualifications, while four of the negative interpretations were made by Board-certified radiologists and B-readers." Decision and Order at 27. He noted that with respect to the newly submitted x-ray evidence, "[t]he two most recent x-rays are positive for pneumoconiosis" and "are based on readings by a dually-qualified [radiologist] and a B-reader, whereas the negative x-ray is only based on the reading of a B-reader." *Id*. at 26. The administrative law judge noted that, due to the progressive nature of pneumoconiosis, he gave greatest weight to the two more recent x-rays and, taking into consideration the qualifications of the physicians involved, he concluded that claimant established the existence of clinical pneumoconiosis. *Id*.

Employer contends that the administrative law judge erred in finding a change in an applicable condition of entitlement established pursuant to 20 C.F.R. §725.309(d)

[4] The October 30, 2006 x-ray was read by Dr. Barrett for the purpose of assessing quality only. Director's Exhibit 15.

because his qualitative comparison of the old and new evidence was flawed. Employer's Brief at 8-9. Under the revised version of 20 C.F.R. §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 that establishes an element of entitlement upon which the prior denial was based. *See* 20 C.F.R. §725.309(d)(2), (3); *White*, 23 BLR at 1-3. Contrary to employer's argument, because the administrative law judge properly performed both a qualitative and quantitative review of the x-ray evidence, taking into consideration the radiological qualifications of the physicians, we reject employer's argument regarding the administrative law judge's qualitative comparison of the old and new evidence under 20 C.F.R. §725.309(d). Consequently, we affirm his finding that claimant established the existence of pneumoconiosis based on the newly submitted x-ray evidence at 20 C.F.R. §718.202(a)(1), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White*, 23 BLR at 1-4-5; *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294 (2003). We also affirm, as supported by substantial evidence, the administrative law judge's finding that claimant satisfied his burden of proof on the merits to establish the existence of pneumoconiosis. Decision and Order at 27.

Employer also challenges the administrative law judge's finding, pursuant to 20 C.F.R. §718.204(c), that claimant is totally disabled due to pneumoconiosis. Employer asserts that the administrative law judge erred in crediting the opinions of Drs. Rasmussen, Alam and Vaezy, that claimant's respiratory disability is due, in part, to coal dust exposure, over the contrary opinions of Drs. Broudy and Jarboe, that claimant's respiratory disability is unrelated to coal dust exposure. Employer specifically argues that the opinions of Drs. Rasmussen, Alam and Vaezy are insufficient to satisfy claimant's burden of proof, as they do not apportion the exact degree to which coal dust exposure and smoking caused claimant's respiratory disability.

Contrary to employer's contention, a physician is not required to specifically apportion the extent to which various causal factors contribute to a totally disabling respiratory or pulmonary impairment in order to provide a credible opinion regarding disability causation, and his failure to do so does not render his opinion insufficiently reasoned. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *see Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003). Rather, a doctor's opinion, stating that pneumoconiosis was one of two causes of claimant's totally disabling respiratory condition, is sufficient to establish that pneumoconiosis is a substantially contributing cause of claimant's total respiratory disability. *Gross*, 23 BLR at 1-18-19.

In this case, the administrative law judge properly found that Drs. Rasmussen, Alam and Vaezy opined that claimant is totally disabled due to both smoking and coal dust exposure, and that they each provided a reasoned and documented opinion explaining why coal dust exposure was at least a contributing factor to claimant's respiratory disability pursuant to 20 C.F.R. §718.204(c).[5] *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002), *citing Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). In contrast, the administrative law judge properly found that, because neither Dr. Broudy nor Dr. Jarboe was of the opinion that claimant has clinical pneumoconiosis, their opinions were entitled to little weight on the issue of whether claimant's clinical pneumoconiosis caused his respiratory disability. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). Thus, we affirm the administrative law judge's finding that claimant satisfied his burden of proving disability causation at 20 C.F.R. §718.204(c). Consequently we affirm the administrative law judge's finding that claimant is entitled to benefits.[6]

[5] The administrative law judge noted that Drs. Rasmussen, Alam and Vaezy set forth the "clinical findings, observations and facts recorded" to explain their conclusion that claimant's disabling respiratory condition was due to both smoking and coal dust exposure. Decision and Order at 33.

[6] Based on our affirmance of the administrative law judge's award of benefits, we hold that application of the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, would not alter the outcome of this case. *See* 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)).

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge