BRB No. 00-1013 BLA

KERMON K. MULLINS (deceased))
)
Claimant-Petitioner)
)
v.)
)
CLINCHFIELD COAL COMPANY) DATE ISSUED:
)
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 Third Remand -- Denying Benefits of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Vincent K. Mullins, Richlands, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Third Remand -- Denying Benefits (92-BLA-1258) of Administrative Law Judge Clement J. Kichuk rendered on a duplicate 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] This case is before the Board for the

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted,

fourth time. In the Board's most recent Decision and Order it delineated the lengthy procedural history of this case. *See Mullins v. Clinchfield Coal Co.*, BRB No. 98-1421 BLA (Nov. 30, 1999)(unpub.). In that decision, the Board reaffirmed its prior holding that the administrative law judge had properly weighed the newly submitted evidence and rationally determined that it did not establish the existence of pneumoconiosis and therefore a material change in conditions based on that element, but the Board vacated the administrative law judge's Decision and Order denying benefits and remanded the case for the administrative law judge to consider and weigh the newly submitted evidence relevant to the issues of total disability and causation of total disability, elements of entitlement which had also been adjudicated against him, and determine whether a material change in conditions was established based on either of those elements pursuant to *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). On remand, the administrative law judge reviewed all the newly submitted evidence and determined that because claimant established total disability he established a material change in conditions. Accordingly, the administrative law judge turned to the merits of the claim. Reviewing both the old and new evidence together on the issue of pneumoconiosis, the administrative law judge found that it failed to establish the existence of pneumoconiosis and causation. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find established both the existence of pneumoconiosis and causation. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Appeals, has not filed a brief in this appeal.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United District Court for the District of Columbia granted limited injunctive relief and stayed for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claims, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No 1:00CV03086 (D.D.C. Feb. 9, 2001) (order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on April 20, 2001, to which employer and the Director have responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of

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refer to the amended regulations.

this case.[2] Based on the briefs submitted by employer and the Director and our review of the record, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, we will proceed to adjudicate the merits of this appeal.

The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational and consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error. The administrative law judge correctly determined that the evidence of record contains over two hundred x-ray readings of forty-three films. In evaluating the x-ray evidence, the administrative law judge properly found that the readers have "equivalent" qualifications and that the negative and positive readings are, therefore, "equally probative" and "evenly balanced." Decision and Order on Third Remand at 23. Thus, the administrative law judge rationally concluded that inasmuch as claimant has the burden of establishing pneumoconiosis by a preponderance of the evidence, and the positive and negative x-ray evidence were evenly balanced, claimant failed to establish the existence of pneumoconiosis by x-ray evidence. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Further, we reject claimant's contention that the administrative law judge erred in not finding that Dr. Sargent's positive x-ray reading established the existence of pneumoconiosis inasmuch as the administrative law judge noted that Dr. Sargent subsequently opined, in later reports and on deposition, that he did not believe that claimant's x-ray was truly indicative of coal workers' pneumoconiosis given its characteristics. Decision and Order on Third Remand at 23. Employer's Exhibit 22 at 8-12; *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000). Finally, contrary to claimant's contention, the administrative law judge is not required to accord greater weight to the opinion of claimant's treating physician. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). Nor, contrary to claimant's contention, did the administrative law judge fail to recognize the progressive nature of pneumoconiosis

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[2] Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on April 20, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

in evaluating the evidence. *See* Decision and Order on Third Remand at 21. Considering the medical opinions as a whole, the administrative law judge properly accorded less weight to the opinions finding the existence of pneumoconiosis as they "lack the requisite reasoning and objective support to find legal pneumoconiosis established in this case." Decision and Order on Third Remand at 29. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 173, 21 BLR 2-34, 2-47 (4th Cir. 1997); *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 822, 19 BLR 2-86, 2-93 (4th Cir. 1995); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Since this determination is supported by substantial evidence, we affirm the administrative law judge's finding that the medical evidence, both old and new, is insufficient to establish the existence of pneumoconiosis. *See Compton*, *supra*; *Rutter*, *supra*. As we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement, we must affirm the administrative law judge's denial of benefits, and we need not consider claimant's argument on causation. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Accordingly, the Decision and Order on Third Remand -- Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge