BRB No. 06-0873 BLA

STARLET TACKETT, Substitute Party o/b/o RONNIE B. TACKETT, Deceased Miner	)	
Claimant-Respondent	)	
v.	)	
H.J. MINING COMPANY, INCORPORATED	)	DATE ISSUED: 07/31/2007
and	)	
BITUMINOUS CASUALTY CORPORATION	)	
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 Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

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

Jeffrey S. Goldberg (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (04-BLA-05248) of Administrative Law Judge Janice K. Bullard on a 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). The administrative law judge found that the claim was timely filed, that claimant[1] established 4.3 years of coal mine employment and that employer was the responsible operator. Decision and Order at 4-6, 15, 22-23. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 6. After determining that the instant claim was a subsequent claim,[2] the administrative law judge found that a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309, since the newly submitted evidence was sufficient to establish that the miner suffered from pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(2), (4), an element previously adjudicated against claimant. Decision and Order at 3, 6, 8-12, 14-16; Director's Exhibit 1. Considering the record *de novo*, the administrative law judge concluded that the evidence was sufficient to establish that the miner's pneumoconiosis arose out of coal mine employment and to establish the existence of totally disabling pneumoconiosis pursuant to 20 C.F.R. §§718.203 and 718.204. Decision and Order at 16-22. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in her application of 20 C.F.R. §725.309, erred in finding that pneumoconiosis was established at 20 C.F.R. §718.202(a)(2) solely because Dr. Caffrey's pathology opinion, that claimant did not have pneumoconiosis, was outweighed by all the other medical opinions; erred in finding that pneumoconiosis was due to coal mine employment under 20 C.F.R. §718.203(c), and erred in finding that total disability was due to pneumoconiosis at 20 C.F.R. §718.204(c). Claimant responds, asserting that substantial evidence supports the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, responds that the administrative law judge

[1] Claimant, the miner's widow, is pursuing the miner's claim. The miner died on July 20, 2005. Claimant's Exhibit 8; Decision and Order at 3.

[2] The miner filed his first claim for benefits on March 9, 1992. That claim was finally denied by the Department of Labor on August 18, 1992. Director's Exhibit 1. The miner filed a second claim on June 28, 2000, which was denied by the district director on October 16, 2000, as no element of entitlement was established. Director's Exhibit 1. The miner took no further action until he filed the instant claim on April 25, 2002.

properly applied Section 725.309, but takes no position with respect to the merits. Employer has filed a reply brief reasserting its position with respect to Section 725.309.[3]

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).

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).[4]

Employer initially contends that the administrative law judge erred in finding that claimant demonstrated a change in an applicable condition of entitlement, pursuant to Section 725.309(d), based on new evidence establishing the existence of pneumoconiosis. Employer asserts that application of the revised regulation is impermissibly retroactive. As the Director points out, employer does not acknowledge that the United States Court of Appeals for the District of Columbia Circuit expressly rejected that argument in *National Mining Association v. Department of Labor*, 292 F.3d 849, 23 BLR 2-124 (D.C. Cir. 2002). Employer contends that the administrative law judge erred in failing to consider whether the new evidence showed a qualitative change from the previously submitted evidence, in keeping with the holding of the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, in *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-228 (6th Cir. 2001). In *Kirk*, the court held that the administrative law judge's analysis, pursuant to Section 725.309(d) (2000), must

[3] The administrative law judge's determinations regarding timeliness, length of coal mine employment and responsible operator, as well as his findings pursuant to 20 C.F.R. §§718.202(a)(1), (3) and 718.204(b) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] The record indicates that the miner was last employed in the coal mine industry in Kentucky. Director's Exhibits 1, 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

include consideration of the qualitative difference between the earlier evidence and the new evidence.

The Sixth Circuit precedent, relied on by employer, construed the prior version of Section 725.309, 20 C.F.R. §725.309 (2000). The current claim was filed after the effective date of the most recent amendments to the regulation. *See* 20 C.F.R. §725.2; Director's Exhibit 3. Under the revised version of Section 725.309, claimant no longer has the burden of proving a "material change in condition;" rather, claimant must show that one of the applicable conditions of entitlement has changed since the prior denial by submitting new evidence developed in connection with the current claim that establishes an element of entitlement upon which the prior denial was based.[5] *See* 20 C.F.R. §725.309(d)(2), (3); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*). Yet, as the Director contends, the result would be the same even if the prior regulation were applied, because the administrative law judge relied upon biopsy and autopsy evidence to find pneumoconiosis, evidence that was unavailable at the time of the prior claim. Hence, employer's argument concerning the administrative law judge's application of Section 725.309 is without merit.

Employer next contends that the administrative law judge erred in finding the existence of pneumoconiosis established at Section 718.202(a)(2). Employer contends that the administrative law judge erred in according less weight to the opinion of Dr. Caffrey, a pathologist, who opined that the miner did not have pneumoconiosis, based on his review of biopsy and autopsy slides. According to employer, the administrative law judge discounted the opinion because a greater number of other doctors found that the miner had pneumoconiosis than not, and because Dr. Caffrey did not himself conduct the autopsy or biopsies.[6] Employer asserts that the administrative law judge's reasons for

[5] In revising 20 C.F.R. §725.309, the Department of Labor intended to afford full effect to the decision of the United States Court of Appeals for the Fourth Circuit in *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), which rejected the Sixth Circuit's requirement that the factfinder consider the qualitative differences between the earlier and current evidence. Director's Brief at 6; *see* 65 Fed. Reg. 79968 (Dec. 20, 2000); 64 Fed. Reg. 54984 (Oct. 8, 1999).

[6] The administrative law judge noted that the autopsy evidence included diagnoses of simple coal workers' pneumoconiosis and anthracosis. In addition, biopsy evidence included diagnoses of anthracosis and clinical pneumoconiosis. On reviewing autopsy slides, Dr. de Lara found macules and nodules consistent with simple coal workers' pneumoconiosis. As rebuttal evidence, employer submitted reports from Drs. Oesterling and Caffrey. Dr. Oesterling, based on his review of biopsy slides, found mild micronodular coal workers' pneumoconiosis. Employer's Exhibit 7 at 9-9. Dr. Caffrey,

according less weight to Dr. Caffrey's opinion are impermissible because the administrative law judge cannot mechanically rely on the numerical superiority of evidence or the status of the physician, *i.e.*, whether he personally conducted the autopsy or biopsy. Employer contends that there is nothing in the opinions of the doctors the administrative law judge credited to show that their ability to conduct a biopsy or autopsy was central to their diagnoses. Employer's Brief at 21-22.

Contrary to employer's arguments, the administrative law judge properly considered the newly submitted autopsy and biopsy evidence and permissibly found that the new opinion of Dr. Caffrey, that the autopsy and biopsy evidence he saw did not indicate the presence of pneumoconiosis, was entitled to less weight as it was inconsistent with *all* of the other autopsy and biopsy opinions submitted in support of the subsequent claim, which found the existence of pneumoconiosis, including the opinions of the physicians who performed the procedures. This reasoning does not constitute an impermissible nose count of the evidence, since the administrative law judge found that the credibility of Dr. Caffrey's opinion was called into question by the fact that it was countered by *all* of the other relevant evidence. *See generally Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995). Further, the administrative law judge did not discount Dr. Caffrey's opinion simply because he reviewed the biopsy and autopsy slides, but, rather, permissibly found that the discussion of pneumoconiosis in "the actual autopsy report [to be] the most reliable evidence of record on the issue…." Decision and Order at 15; Claimant's Exhibits 8, 9, 11; Employer's Exhibits 6-9, 20. The Board is required to defer to the administrative law judge's assessment of the physicians' credibility. *Peabody Coal Co. v. Groves*, 227 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). We, therefore, affirm the administrative law judge's finding that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2). The administrative law judge's finding that a change in an applicable condition of entitlement was established pursuant to Section 725.309(d) is, therefore, supported by substantial evidence.

Employer further asserts, pursuant to Section 718.203(c), that the administrative law judge erred in finding Dr. de Lara's opinion sufficient to establish that the miner's pneumoconiosis arose out of coal mine employment, in light of the miner's history of only four years of coal mine employment and the miner's twenty-five year pack-a-day cigarette smoking habit.[7] Employer contends that, contrary to the administrative law

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on review of the biopsy slides, found anthracotic pigment, but no pneumoconiosis. Employer's Exhibit 9 at 9.

[7] Dr. de Lara diagnosed simple coal workers' pneumoconiosis and found that the miner's chronic obstructive pulmonary disease was due to coal mining, as well as tobacco abuse. Claimant's Exhibit 11.

judge's finding, there is evidence from pulmonary disease experts, attributing the miner's pulmonary disease to smoking, rather than coal mine employment, *e.g.*, Dr. Caffrey opined that the miner suffered from bullous emphysema and chronic obstructive pulmonary disease due to smoking and Dr. Oesterling diagnosed panlobular pulmonary emphysema due to the miner's "significant" smoking history.[8] Employer contends, therefore that the administrative law judge erred in finding a causal relationship between the miner's pneumoconiosis and his coal mine employment. Employer also argues that the administrative law judge did not comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), as she did not adequately explain her reason for crediting or discrediting relevant evidence.[9]

Contrary to employer's argument, the administrative law judge permissibly found that claimant established the requisite relationship between the miner's pneumoconiosis and coal mine employment based on the March 6, 2006 letter from Dr. de Lara, wherein he stated that, based on his review of ten of the miner's autopsy slides, the miner's "pulmonary disease developed as a result of coal mining exposure as evidenced by the features on the right lung (native) and also tobacco use for many years as a contributing factor." Claimant's Exhibit 11. In that same letter Dr. de Lara diagnosed nodules consistent with simple coal workers' pneumoconiosis. Claimant's Exhibit 11.

We conclude that the administrative law judge rationally found the requisite causal relationship established between the miner's pneumoconiosis and his coal mine employment, based on Dr. de Lara's letter. Decision and Order at 16. Contrary to employer's arguments, the administrative law judge did not ignore Dr. de Lara's alleged lack of expertise. The administrative law judge noted that Dr. de Lara was a Board-certified pulmonologist. Decision and Order at 15. Moreover, we reject employer's argument that the opinions of Drs. Caffrey, Rosenberg and Oesterling are sufficient to establish that the miner's pneumoconiosis was not due to coal mine employment. The administrative law judge rationally found that their opinions were outweighed by the

[8] Employer also asserts that the administrative law judge should have considered Dr. Rosenberg's opinion that the miner's total disability was due exclusively to his long history of cigarette smoking. Employer's Brief at 24. This contention goes to the cause of disability, not to the cause of disease, however, and will not, therefore be considered at 20 C.F.R. §718.203(c). *See* 20 C.F.R. §718.204(c).

[9] The Administrative Procedure Act requires that each adjudicatory decision include a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law or discretion presented on the record...." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2).

contrary evidence. The administrative law judge could reasonably accord less weight to Dr. Caffrey's opinion because Dr. Caffrey did not find the existence of pneumoconiosis, which was contrary to the findings on autopsy and biopsy. Further, contrary to employer's contention Dr. Rosenberg did not find that the miner's minimal coal workers' pneumoconiosis was not due to coal mine employment. Employer's Exhibits 8, 9, 20. Although, Dr. Oesterling diagnosed panlobular pulmonary emphysema due solely to a significant smoking history, he also diagnosed micronodular coal workers' pneumoconiosis, a fact which employer does not acknowledge. Employer's Brief at 24; Employer's Exhibit 6 at 2. Dr. Oesterling's opinion thus supports the administrative law judge's determination. We, therefore, affirm the administrative law judge's finding that Dr. de Lara's opinion was sufficient to establish that the miner's pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(c). 20 C.F.R. §718.203(c); *see Stomps v. Director, OWCP*, 816 F.2d 1533, 10 BLR 2-107 (11th Cir. 1987); *Meeks v. Director, OWCP*, 6 BLR 1-794 (1984).

Employer finally asserts that the administrative law judge erred in relying on the opinions of Drs. Forehand, Ammisetty, Mettu, and Olano to find that the miner's total disability was due to pneumoconiosis pursuant to Section 718.204(c).[10] Employer contends that the administrative law judge could not rely on the opinions of Drs. Forehand and Ammisetty, attributing claimant's disability to coal mine employment, when the doctors relied on inflated years of coal mine employment and the administrative law judge had already discredited their opinions regarding the existence of pneumoconiosis for that reason. Likewise, employer contends that Drs. Forehand and Ammisetty did not provide sufficient explanations for their conclusions that claimant's disability was due to coal mine employment. Employer also contends that the administrative law judge erred in crediting the opinions of Drs. Mettu and Olano solely

[10] Section 718.204(c) provides:

> (1) A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis…is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
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> > (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
> > (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1)(i) and (ii).

because they were "treating physicians" since the doctors did not explain how coal mine employment, not smoking, was the cause of the miner's disability. Instead, employer contends that the administrative law judge should have credited the well-reasoned opinions of Drs. Repsher and Rosenberg that the miner's disability was not due to coal mine employment, but was entirely due to smoking, as they were better reasoned.

In discussing the medical opinion evidence pursuant to Section 718.204(c), the administrative law judge found that the causation opinion of Dr. Ammisetty, attributing the miner's disability to both pneumoconiosis and smoking, was compromised because it was based on an inaccurate length of coal mine employment. The administrative law judge went on, however, to find that the opinion was nonetheless reasoned on causation and entitled to some weight, as the doctor's finding of pneumoconiosis was supported by autopsy and biopsy evidence of pneumoconiosis. Decision and Order at 21; Director's Exhibit 15. Regarding the opinion of Dr. Forehand, which was also based on an inaccurate length of coal mine employment history, the administrative law judge found that it was nonetheless reasoned on causation, as the doctor explained that even a miner with a length of coal mine employment similar to the miner's could be disabled by coal dust exposure.[11] The administrative law judge further noted that Dr. Forehand's opinion was reasoned because the doctor found that the miner's pulmonary function study results would not have been as reduced by the effects of smoking alone and that, if smoking had been the sole cause of the miner's impairment, the doctor would have seen other effects of smoking such as peripheral vascular disease, coronary artery disease and diabetes mellitus which he did not find. Additionally, the administrative law judge observed that Dr. Forehand's opinion was supported by the opinions of Drs. Mettu and Olano, who were the miner's treating physicians, noting that Dr. Mettu diagnosed a severe pulmonary impairment partly attributable to coal mine employment and Dr. Olano opined that coal dust exposure significantly contributed to the miner's totally disabling occupational lung disease. Decision and Order at 22; Claimant's Exhibit 8; Director's Exhibit 1. In contrast, the administrative law judge found the opinion of Dr. Repsher, that the miner's disability was due solely to bullous emphysema due to smoking, and was not in any related to coal mine employment, entitled to limited weight as the physician had not diagnosed the existence of pneumoconiosis. Decision and Order at 22; Employer's Exhibit 4. Further, while acknowledging that Dr. Rosenberg diagnosed a minimal degree of coal workers' pneumoconiosis, the administrative law judge nonetheless found the opinion of Dr. Rosenberg, that the miner's disability was due to smoking, outweighed by the opinion of Dr. Forehand, which was better reasoned and was corroborated by the miner's treating physicians. Decision and Order at 22; Employer's Exhibit 1. The

[11] Dr. Forehand explained that "breathing silica-containing hard rock coal mine dust for as little as 5 years can lead to coal workers' pneumoconiosis and completely destroy the lungs of a susceptible person." Decision and Order at 22.

administrative law judge, therefore, concluded that the medical opinion of Dr. Forehand, as corroborated by the opinions of Drs. Mettu and Olano, claimant's treating physicians, established disability causation. The administrative law judge also credited the opinion of Dr. Ammisetty as supportive of disability causation.

We disagree with employer that the administrative law judge erred in crediting the opinions of Drs. Ammisetty and Forehand on disability causation because they relied on an inaccurate length of coal mine employment since the administrative law judge acknowledged their error. The administrative law judge noted that even though Dr. Ammisetty's opinion was based on an inaccurate length of coal mine employment, his finding that pneumoconiosis was a cause of disability was supported by the biopsy and autopsy findings of pneumoconiosis. *See generally Gross v. Dominion Coal Corp.*, 8 BLR 1-23 (2003). Likewise, the administrative law judge found that Dr. Forehand cured any defect in relying on an inaccurate length of coal mine employment when he opined that a miner even with a length of coal mine employment similar to the miner's could be disabled by pneumoconiosis. Further, contrary to employer's argument, Dr. Ammisetty's opinion was not unreasoned because he did not specifically explain the mechanics of how pneumoconiosis contributed to the miner's disability. Nor, contrary to employer's argument, is Dr. Olano's opinion rendered less reasoned because he did not discuss the miner's smoking history since he found the existence of clinical pneumoconiosis and attributed claimant's disability to clinical, not legal pneumoconiosis. *See* 20 C.F.R. §718.201. Further, contrary to employer's argument, the administrative law judge rationally accorded less weight to Dr. Repsher's opinion because the doctor did not find the existence of pneumoconiosis. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1989).

We agree with employer, however, that the administrative law judge erred in according greater weight to the opinion of Dr. Forehand on the ground that Dr. Forehand concluded that smoking was not the sole cause of disability because the miner did not have evidence of heart disease and diabetes. The autopsy report and the record do show evidence of heart disease and diabetes. Accordingly, the administrative law judge erred in crediting Dr. Forehand's opinion, in part, for the reasons given and we must vacate the administrative law judge's finding that the miner's pneumoconiosis significantly contributed to his total disability and remand the case for further consideration of Dr. Forehand's opinion along with the other opinions. On remand, the administrative law judge must explain how Dr. Forehand's opinion is better documented and reasoned than the opinion of Dr. Rosenberg, who acknowledged the presence of minimal coal workers' pneumoconiosis but, on review of the record, found that the miner's total disability was due solely to smoking. The administrative law judge must also explain how findings of pneumoconiosis on autopsy and biopsy support Dr. Ammisetty's opinion that pneumoconiosis was a cause of disability. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989). Additionally, on remand, the administrative law judge may not

mechanically rely on the opinions of Drs. Mettu and Olano because they are "treating physician," but must explain why he finds their opinions "persuasive." *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2000).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge