

BRB No. 02-0595 BLA

PAUL PENNINGTON)
)
 Claimant-Respondent)
)
 v.)
)
 RIFLE COAL COMPANY) DATE ISSUED:
)
 and)
)
 TRAVELERS INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT OF)
 LABOR)
) DECISION AND ORDER
 Party-in-Interest
 Appeal of the Decision and Order - Award of Benefits of Daniel J.
 Roketenetz, Administrative Law Judge, United States Department of
 Labor.

J. Logan Griffith (Porter, Schmitt, Jones & Banks), Paintsville,
 Kentucky, for employer.

Before: SMITH, HALL and GABAUER, Administrative Appeals
 Judges.

PER CURIAM:

Employer appeals the Decision and Order - Award of Benefits (2001-BLA-1019) of Administrative Law Judge Daniel J. Roketenetz 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).¹ In his decision, the administrative law judge determined that the instant case involves a request for modification of the denial of claimant's 1998 duplicate claim.² Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited claimant with sixteen years of coal mine employment, based on a stipulation of the parties. Initially, the administrative law judge found that the new medical evidence, *i.e.*, the medical evidence submitted since the 1996 Decision and Order denying claimant's initial claim, was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Consequently, the administrative law judge found that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).³ Addressing the merits, 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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

² Claimant filed his initial application for benefits on January 1, 1994. Director's Exhibit 37 at 264. In a Decision and Order issued January 12, 1996, Administrative Law Judge Robert L. Hillyard denied benefits, finding that claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 37 at 1.

Claimant filed a second application for benefits on September 22, 1998. This claim was denied by the district director in an Order dated April 1, 1999. Director's Exhibits 1, 10. Claimant filed a request for modification on March 24, 2000, which was denied by the district director in an Order dated August 22, 2000. Director's Exhibits 11, 15, 15a. A second request for modification was filed on September 18, 2000 and denied on March 14, 2001. Claimant requested a formal hearing and the claim was referred to the Office of Administrative Law Judges. Director's Exhibits 16, 38.

³ The administrative law judge properly considered all of the evidence submitted in support of the duplicate claim, plus all of the evidence submitted in support of modification, to determine that claimant established the requisite material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000). See *Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998). Since claimant made a timely request for modification of the district director's determination that claimant failed to establish a material change in conditions, he thereby invoked the administrative law judge's authority to consider whether there was a change in conditions since the denial of the duplicate claim. 20 C.F.R. §725.310 (2000); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th

administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a)(4) and 718.203(b). The administrative law judge further found that the evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b) and that pneumoconiosis is a substantially contributing cause of claimant's total respiratory disability pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits commencing as of September 1998.

On appeal, employer challenges the administrative law judge's award of benefits, arguing that the administrative law judge erred in weighing the medical evidence of record. Claimant has not responded in this appeal. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in this appeal.⁴

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

After consideration of the administrative law judge's Decision and Order - Award of Benefits, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained

Cir. 1994); *Hess, supra*; see also *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). However, this in no way diminished claimant's burden to prove a material change in conditions before he is entitled to the adjudication of his claim on the merits. 20 C.F.R. §725.309(d) (2000); see *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Consequently, the administrative law judge was required to consider whether all of the evidence submitted in support of the duplicate claim, plus all of the evidence submitted in support of modification, established the requisite material change in conditions pursuant to Section 725.309(d) (2000). See *Hess, supra*.

⁴ The parties do not challenge the administrative law judge's decision to credit claimant with sixteen years of coal mine employment, his findings pursuant to 20 C.F.R. §§718.202(a)(1)-(3) and 718.204(b), or his determination of the date of onset. These findings are therefore affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

therein. *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Employer generally contends that the administrative law judge erred in finding that claimant established the existence of pneumoconiosis arising out of coal mine employment and that his total disability was due to pneumoconiosis as the administrative law judge failed to properly weigh the evidence of record. Employer's Brief at 10. Specifically, employer contends that the administrative law judge impermissibly rejected the opinions of Drs. Broudy and Fritzhand and erred in according greater weight to the opinions of Drs. deGuzman, Sundaram, Rasmussen, Westerfield and Burki, the opinions supportive of claimant's position. We do not find merit in employer's argument.

Employer's contentions constitute a request that the Board reweigh the evidence, which is beyond the scope of the Board's powers. See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). The administrative law judge must determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. See *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986).

In weighing the medical evidence of record, the administrative law judge concluded that the reports of Drs. deGuzman, Sundaram, Rasmussen, Westerfield and Burki, that claimant suffered from pneumoconiosis, constituted well-reasoned and documented opinions.⁵ The administrative law judge explained that the physicians provided medical support for their conclusions.

⁵ Contrary to employer's contention, the administrative law judge took the qualifications of the physicians into consideration in weighing the medical evidence. Decision and Order at 11-15, 22. The administrative law judge found that Drs. Westerfield, Burki, Rasmussen and Sundaram are all Board-certified in Internal Medicine, with Drs. Westerfield and Burki also Board-certified in Pulmonary Diseases. *Id.* Similarly, the administrative law judge found that Dr. Broudy is Board-certified in Internal Medicine and Pulmonary Diseases. Director's Exhibit 15.

Decision and Order at 16, 22. As the determination of whether a medical opinion is sufficiently reasoned and documented to support an element of entitlement is within the discretion of the administrative law judge and employer raises no specific challenge to the administrative law judge's weighing of the individual medical opinions, we affirm the administrative law judge's finding that these opinions are reasoned and documented. See *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

The administrative law judge further found that Drs. deGuzman and Sundaram were claimant's treating physicians and, as such, determined that their opinions are highly probative. Decision and Order at 22. Contrary to employer's general contention, the administrative law judge did not mechanically accord greater weight to the treating physicians because of that status. Rather, he determined that the opinions of Drs. deGuzman and Sundaram were well-reasoned and well-documented, based on his finding that they considered complete and accurate medical, social and occupational histories and also reviewed the objective medical data. Decision and Order at 22. This determination therefore constitutes a permissible basis for according greater weight to the opinions of the treating physicians. See *Jericol Mining, Inc. v. Napier*, 311 F.3d 703, BLR (6th Cir. 2002); *Wolfe Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, BLR (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 834, 22 BLR 2-320 (6th Cir. 2002); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993).

With regard to the contrary medical opinions of Drs. Broudy and Fritzhand, the administrative law judge likewise found these opinions to be credible. Decision and Order at 23. Contrary to employer's contention, however, the administrative law judge did not reject the medical opinions of Drs. Broudy and Fritzhand, but rather, accorded them less weight than the medical opinions supportive of a finding of the existence of pneumoconiosis. *Id.* In particular, the administrative law judge reasonably accorded little weight to Dr. Fritzhand's 1994 medical report, which was several years older than the other relevant medical opinions, based on the age of the report. Decision and Order at 23; Director's Exhibit 37-227; see *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Cosalter v. Mathies Coal Co.*, 6 BLR 1-1182 (1984). Furthermore, the administrative law judge reasonably found a preponderance of the medical evidence established the existence of pneumoconiosis, based on his finding that Dr. Broudy's opinion, as

well as Dr. Fritzhand's opinion, were outweighed by the medical opinions of record which stated that claimant suffered from pneumoconiosis. Decision and Order at 23; *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994).

As employer makes no other specific challenge to the administrative law judge's findings, we affirm the administrative law judge's award of benefits. See *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge