BRB No. 05-0497 BLA

EUGENE J. REBYANSKI	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CANTERBURY COAL COMPANY	)	
	)	DATE ISSUED: 03/14/2006
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand - Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand - Awarding Benefits (03-BLA-5496) of Administrative Law Judge Daniel L. Leland rendered 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). This subsequent claim[1] is before the Board for the second time. Initially, the administrative law judge credited claimant with twenty-three years of coal mine employment[2] and found that the medical evidence developed since the prior denial of benefits established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge therefore determined that claimant established a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). The administrative law judge further found that claimant established that he was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

Upon review of employer's appeal, the Board rejected several of employer's allegations of error, but held that the case had to be remanded for the administrative law judge to reconsider relevant evidence. *Rebyanski v. Canterbury Coal Co.*, BRB No. 04-0180 BLA (Sep. 29, 2004)(unpub.). Specifically, the Board upheld the administrative law judge's application of 20 C.F.R. §725.414 to exclude certain evidence submitted by employer, and rejected employer's argument that the administrative law judge erred in failing to require claimant to prove that he suffered from a type of pneumoconiosis known to be progressive. *Rebyanski*, slip op. at 3-6, citing *Workman v. Eastern Associated Coal Corp*., 23 BLR 1-22 (2004)(*en banc*). The Board additionally held that the administrative law judge properly found that the x-ray evidence supported a finding of pneumoconiosis, properly weighed the medical opinion evidence regarding the existence of pneumoconiosis, and properly found that claimant is totally disabled by a respiratory or pulmonary impairment. *Rebyanski*, slip op. at 6-9.

However, the Board agreed that the administrative law judge did not resolve the conflicting computed tomography (CT) scan readings regarding the existence of pneumoconiosis, or weigh together the x-rays, CT scans, and medical opinions as required by *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). *Rebyanski*, slip op. at 8. Therefore, the Board vacated the administrative law

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[1] Claimant's initial application for benefits, filed on September 21, 1992, was denied on April 9, 1999 because claimant did not establish the existence of pneumoconiosis. Director's Exhibit 1. Claimant filed his current application more than one year later, on January 24, 2001. *See* 20 C.F.R. §725.309(d); Director's Exhibit 3.

[2] The record indicates that claimant's coal mine employment occurred in Pennsylvania. Director's Exhibits 4-7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

judge's findings pursuant to 20 C.F.R. §§718.202(a), 725.309(d) and remanded the case for further findings based on the new medical evidence. The Board also instructed the administrative law judge that if he found the existence of pneumoconiosis established and reached the merits of the claim, he should consider the medical opinions concerning the cause of claimant's total disability pursuant to *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004). *Rebyanksi*, slip op. at 10 n.8.

On remand, the administrative law judge considered one positive and two negative readings of an August 3, 2000 CT scan, based on the readers' radiological credentials, and found that overall, the readings were negative for pneumoconiosis. The administrative law judge found that although the CT scan readings were negative, they merited "less weight" when weighed together with the "overwhelming[ly] positive" x-ray readings and well reasoned medical opinions diagnosing claimant with pneumoconiosis. Decision and Order on Remand at 4. The administrative law judge explained that he found no basis for giving greater weight to the negative CT scan readings. Consequently, he found that when all the relevant evidence was weighed together, it established "by a preponderance of the evidence that Claimant has pneumoconiosis." *Id*. The administrative law judge therefore found that claimant established a change in an applicable condition of entitlement pursuant to Section 725.309(d). The administrative law judge further found that claimant's pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b), and he reincorporated by reference his prior rationales and findings that claimant is totally disabled and that his total disability is due to pneumoconiosis pursuant to Section 718.204(b),(c). The administrative law judge additionally found that, pursuant to *Soubik*, Dr. Pickerill's opinion that claimant is not totally disabled due to pneumoconiosis merited less weight, because Dr. Pickerill did not diagnose claimant with pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge violated employer's due process rights when he refused to reopen the record for employer to submit evidence that it claimed was necessary because of a purported change in the law effected by the Board's decision in *Workman*. Employer further asserts that the administrative law judge abused his discretion in excluding from the record most of Dr. Pickerill's supplemental medical opinion submitted by employer. Additionally, employer argues that the administrative law judge erroneously discredited the CT scan evidence, and erred in finding that employer did not rebut the presumption that claimant's pneumoconiosis arose out of his coal mine employment. Employer also contends that the administrative law judge erred in failing to consider whether claimant's entitlement was precluded by pre-existing disabilities. Finally, employer alleges that the administrative law judge misapplied *Soubik* to discount Dr. Pickerill's opinion. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs responds, taking no position on claimant's entitlement, but

urging the Board to reject several of employer's arguments. Employer has filed a reply brief reiterating its contentions.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim shall 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. Consequently, claimant had to submit new evidence establishing the existence of pneumoconiosis in this claim. 20 C.F.R. §725.309(d)(2), (d)(3); s*ee Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995) (holding, under the former provision, that claimant must establish at least one of the elements of entitlement previously adjudicated against him).

Employer contends that the administrative law judge violated employer's right to due process when he refused to reopen the record on remand for employer to respond to a change in law concerning the latency and progressivity of pneumoconiosis purportedly wrought by the Board's decision in *Workman*. This contention lacks merit. The administrative law judge found that, "*Workman* did not create new law, nor create a new burden on any party." Order Denying Motion to Remand or to Reopen the Record at 1. He was correct. In *Workman*, the Board held that the amendments to the definition of pneumoconiosis in Section 718.201 did not alter claimant's burden of proving that he suffers from pneumoconiosis arising out of coal mine employment by a preponderance of the evidence and without the benefit of any presumption of latency or progressivity. *Workman*, 23 BLR at 1-26. Additionally, the Board held that neither the regulations nor the decision of the United States Court of Appeals for the District of Columbia Circuit in *National Mining Ass'n v. Department of Labor*, 292 F.3d 849, 23 BLR 2-124 (D.C. Cir.

2002) (NMA), required a claimant to prove that he suffers from a particular type of pneumoconiosis that is documented in the medical literature as latent and progressive. *Id*. Therefore, employer's assertion that NMA imposed such a burden on claimant, and that *Workman* then changed the law by removing the burden, is incorrect. *Workman*, 23 BLR at 1-26.

Since *Workman* did not change the law, a reopening of the record was not required to satisfy due process. Thus, the question of whether to reopen the record on remand in this case was a procedural matter within the administrative law judge's discretion. *Troup v. Reading Anthracite Coal Co*., 22 BLR 1-11, 1-21 (1999)(*en banc*). Employer has demonstrated no abuse of discretion by the administrative law judge in declining to reopen the record.

Employer alleges that the administrative law judge abused his discretion in excluding part of Dr Pickerill's May 12, 2003 supplemental report proffered by employer. The administrative law judge made this ruling in a pre-hearing order issued on June 30, 2003. Although it was employer's burden to specify the issues to be considered by the Board, employer did not raise this issue when this case was before the Board on employer's initial appeal. *See* 20 C.F.R. §802.211(b). The administrative law judge on remand confined his Decision and Order to those issues addressed in the Board's decision remanding the case. Because employer did not raise this issue in the initial appeal, employer may not raise it now. *See Dankle v. Duquesne Light Co*., 20 BLR 1-1, 1-7 (1995); *Gillen v. Peabody Coal Co*., 16 BLR 1-22, 1-25 (1991).

Employer contends that in considering whether claimant established the existence of pneumoconiosis, the administrative law judge provided invalid reasons for "downgrad[ing]" the negative CT scan evidence. Employer's Brief at 12. However, review of the administrative law judge's decision reflects that he did not categorically reject the CT scans, as employer claims, but rather, found no basis for giving the negative CT scans greater weight than any of the other types of evidence presented in this case. Decision and Order on Remand at 3-4. The administrative law judge's approach was consistent with law. The administrative law judge must weigh together "all types of relevant evidence . . . to determine whether the claimant suffers from [pneumoconiosis.]" *Williams*, 114 F.3d at 25, 21 BLR at 2-111. Additionally, it has been held that an administrative law judge need not give a negative CT scan reading greater weight than other types of evidence. *Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 890-93, 22 BLR 2-409, 2-417-22 (7th Cir. 2002). In this case, the administrative law judge reasonably found that the negative CT scan readings were outweighed by the "overwhelming[ly] positive" x-rays and by the medical opinions diagnosing claimant with pneumoconiosis. Decision and Order on Remand at 4; *Williams*, 114 F.3d at 25, 21 BLR at 2-111. Additionally, it was reasonable for the administrative law judge to find that although employer submitted scientific evidence stating that high resolution CT

scans are highly reliable, the record did not indicate that the particular CT scan in this case was a high resolution CT scan. *See Stein*, 294 F.3d at 893, 22 BLR at 2-423. Substantial evidence supports the administrative law judge's finding. Director's Exhibits 21, 22; Claimant's Exhibit 2. Therefore, we reject employer's allegation of error and affirm the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a), and a change in an applicable condition of entitlement pursuant to Section 725.309(d).

Pursuant to Section 718.203(b), the administrative law judge found that "Dr. Pickerill's observations that the irregular opacities on [claimant's] x-ray are atypical for pneumoconiosis and that the x-ray changes 'could' be related to cardiac disease and congestive heart failure are too indefinite to overcome the presumption" that claimant's pneumoconiosis arose out of coal mine employment. Decision and Order on Remand at 4. This was a permissible determination. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Justice v. Island Creek Coal Co*., 11 BLR 1-91, 1-94 (1988). Employer contends that the administrative law judge erred by failing to also discuss Dr. Pendergrass's comment, on an x-ray classification form, that irregular opacities on claimant's x-ray "may be secondary to cardiovascular disease." Director's Exhibit 17 We conclude that error, if any, by the administrative law judge was harmless. *See Larioni v. Director, OWCP,* 6 BLR 1-1276, 1-1278 (1984). The administrative law judge considered the evidence that claimant does not have pneumoconiosis, and he credited the opinions of those physicians who took into account both claimant's coal mine employment and heart disease and concluded that he has pneumoconiosis and is totally disabled due to pneumoconiosis. Decision and Order on Remand at 2-5. Thus, error, if any, with regard to Dr. Pendergrass's comment was harmless. *Larioni*, 6 BLR at 1-1278. We therefore affirm the administrative law judge's finding pursuant to Section 718.203(b).

Pursuant to Section 718.204(c), employer argues that the administrative law judge erred in finding that claimant is totally disabled due to pneumoconiosis. The administrative law judge applied the proper standard, which is whether pneumoconiosis is a "substantially contributing cause" of claimant's total disability. 20 C.F.R. §718.204(c)(1); *see Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989); Decision and Order on Remand at 5, incorporating 2003 Decision and Order at 7-8. Contrary to employer's contention, nonpulmonary or nonrespiratory disabilities are irrelevant to determining whether a miner is totally disabled due to pneumoconiosis. 20 C.F.R. §718.204(a); *see also Beatty v. Danri Corp.*, 49 F.3d 993, 1002, 19 BLR 2-136, 2-154 (3d Cir. 1995). Thus, employer's argument that the administrative law judge erred by failing to consider whether claimant's alleged preexisting disability from a knee injury precludes entitlement lacks merit. Similarly devoid of merit is employer's argument that the administrative law judge's finding in the prior claim, that claimant was totally disabled by a respiratory impairment unrelated to pneumoconiosis, precludes a finding

that he is totally disabled due to pneumoconiosis. Where, as here, a claimant establishes a change in an applicable condition of entitlement, "no findings made in connection with the prior claim . . . shall be binding on any party in the adjudication of the subsequent claim." 20 C.F.R. §725.309(d)(4).

Substantial evidence supports the administrative law judge's finding that a preponderance of the evidence established that pneumoconiosis is a substantially contributing cause of claimant's total disability. The administrative law judge found that pneumoconiosis substantially contributes to claimant's total disability based on the opinions of Drs. Malhotra and Schaaf, who he found were aware that claimant suffers from heart disease, yet concluded that pneumoconiosis contributes to his total disability. Decision and Order on Remand at 5, incorporating 2003 Decision and Order at 7; Director's Exhibits 12-15; Claimant's Exhibit 1. Although employer contends that the opinions of Drs. Malhotra and Schaaf were unreasoned and should not have been credited, the administrative law judge specifically found that Dr. Schaaf's opinion was "well reasoned as to total disability and causation," and that it was "supported" by Dr. Malhotra's opinion.[3] Decision and Order on Remand at 5. The extent to which Dr. Schaaf's opinion was reasoned, and supported by Dr. Malhotra's opinion, was a credibility matter for the administrative law judge, *see Kertesz*, 788 F.2d at 163, 9 BLR at 2-8, and there is substantial evidence to support his finding. Director's Exhibits 12-15; Claimant's Exhibit 1. The administrative law judge questioned the reasoning of Dr. Pickerill's opinion attributing claimant's disability solely to heart disease, because Dr. Pickerill based his conclusion on normal pulmonary function studies and negative chest x-rays that were taken after claimant retired in 1982. Director's Exhibit 16 at 10-11; Director's Exhibit 24 at 20-22, 26, 29, 33. The administrative law judge permissibly discounted this reasoning as essentially "assum[ing] that claimant is not totally disabled due to pneumoconiosis merely because he was not suffering from a coal dust-related pulmonary impairment at the time he retired." 2003 Decision and Order at 7; *see* 20 C.F.R. §718.201(c); *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 22 BLR 2-467 (3d Cir. 2002).

Additionally, the administrative law judge did not misapply *Soubik* when he gave less weight to Dr. Pickerill's causation opinion. Dr. Pickerill did not diagnose claimant with pneumoconiosis. Director's Exhibit 16 at 6, 10; Director's Exhibit 24 at 21, 25, 29, 37. Thus, it was proper for the administrative law judge to give less weight to his opinion as to whether pneumoconiosis contributed to claimant's total disability. *See Soubik*, 366

[3] Contrary to employer's contention, in making this finding the administrative law judge took into account Dr. Malhotra's statement he could not specify percentages by which heart disease and pneumoconiosis each contributed. Decision and Order on Remand at 5; Director's Exhibit 12 at 4.

F.3d at 234, 23 BLR at 2-99. We therefore reject employer's allegations of error and affirm the administrative law judge's finding pursuant to Section 718.204(c).

Claimant's counsel has filed a complete, itemized statement requesting a fee for services performed in the prior appeal pursuant to 20 C.F.R. §802.203. Counsel requests a fee of $2,625.00 for 17.5 hours of legal services at an hourly rate of $150.00. No objections to the fee petition have been received. The Board finds the requested fee to be reasonable in light of the services performed and approves a fee of $2,625.00, to be paid directly to claimant's counsel by employer. 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order on Remand - Awarding Benefits is affirmed, and claimant's counsel is awarded a fee of $2,625.00.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge