BRB No. 07-0123 BLA

J. O.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ENERGY WEST MINING, INCORPORATED	)	
	)	
	)	DATE ISSUED: 10/29/2007
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 – Awarding Benefits of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman, Denver, Colorado, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Helen H. Cox (Jonathan L. Snare, Acting Solicitor of Labor; 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (04-BLA-5609) of Administrative Law Judge Jennifer Gee on a subsequent 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 credited claimant with twenty-five years of coal mine employment and noted that the instant claim is a subsequent claim. The administrative law judge determined that employer was properly named as the responsible operator, and denied employer's motion to be dismissed. The administrative law judge noted that the case file from claimant's 1980 claim had been destroyed, and she found that the reasons for the denial of the first claim were unclear. Therefore, the administrative law judge stated that she would decide the current claim on the newly submitted evidence. The administrative law judge found that the evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), arising out of claimant's coal mine employment, pursuant to 20 C.F.R. §718.203(b). The administrative law judge also found that the evidence established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's decision to retain it as the responsible operator. Employer also asserts that the administrative law judge erred in deferring to the opinions of Drs. Morgan, Poitras, and James, and in discrediting the opinions of Drs. Fino and Farney. The Director, Office of Workers' Compensation Programs (the Director), responds solely to employer's challenge to the administrative law judge's responsible operator finding, urging the Board to affirm the administrative law judge's finding. Claimant responds, urging affirmance of the administrative law judge's award of benefits.[1]

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).

20 C.F.R. §718.202(a)(4)

Employer challenges the administrative law judge's reliance on Dr. Morgan's opinion, that claimant has chronic obstructive pulmonary disease (COPD) significantly to his coal mine dust exposure, to find the existence of pneumoconiosis established. Employer asserts that Dr. Morgan's opinion is not well-reasoned nor documented and that the administrative law judge improperly relied upon a treating physician

[1] The administrative law judge's length of coal mine employment finding, and her finding pursuant to 20 C.F.R. §718.203(b) are not challenged on appeal. Therefore, these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

presumption. We disagree. Contrary to employer's assertion, the fact that Dr. Morgan identified two contributing causes to claimant's COPD -- coal mine dust and dust exposure in cattle ranching -- does not show equivocation in his opinion. Under the statutory definition of legal pneumoconiosis, claimant is not required to establish that coal mine dust was the only cause of his respiratory disease. *See* 20 C.F.R. §718.201(a)(2); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); Employer's Exhibit 12 at 27, 43-44, 48-50. We also reject employer's assertion that the administrative law judge erred in relying on Dr. Morgan's opinion, because the physician was unaware of later normal pulmonary function study results. The administrative law judge must consider each report to determine if the documentation underlying it supports the physician's conclusion. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, n.4 (1993); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge did so here, and substantial evidence supports her finding in that regard. Further, the administrative law judge did not err by not addressing Dr. Morgan's comment that he relied upon Dr. Poitras's diagnosis of coal workers' pneumoconiosis, since the issue being considered was the existence of legal pneumoconiosis, where the *cause* of claimant's COPD must be determined. 20 C.F.R. §718.201(a)(2); Decision and Order at 22-23.

Turning to Dr. Poitras's opinion, that claimant has COPD significantly related to his coal mine dust exposure, employer asserts that this opinion is not well-reasoned and was internally inconsistent as to the contribution of claimant's other exposures. A review of Dr. Poitras's deposition reveals that when he opined that claimant had "no other significant exposures," he was referring to the fact that claimant had not smoked, and he noted that claimant's coal mine employment involved "a fairly significant exposure to coal dust." Employer's Exhibit 13 at 36. Both claimant's employment history and the absence of a smoking history are appropriate medical considerations. *United States Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992, 23 BLR 2-213, 2-238 (11th Cir. 2004); *Big Horn Coal Co. v. Director, OWCP* [*Alley*], 897 F.2d 1052, 13 BLR 2-372, 2-378 (10th Cir. 1990). Further, any changes in Dr. Poitras's opinion, after considering Dr. Farney's opinion, that other exposures may also have contributed, were simply refinements of his opinion, and continued to support a finding of legal pneumoconiosis. 20 C.F.R. §718.201(a). In addition, contrary to employer's assertion, the administrative law judge did note Dr. Poitras's diagnosis of heart disease and his opinion that claimant's heart disease played a role in claimant's shortness of breath, Decision and Order at 8, and the statutory definition of legal pneumoconiosis does not require claimant to demonstrate that coal mine dust was the sole cause of his respiratory disease. *Cornett*, 227 F.3d 569, 22 BLR 2-107. We therefore reject employer's allegation that the administrative law judge erred in relying on Dr. Poitras's opinion.

Employer challenges the administrative law judge's reliance on Dr. James's opinion, arguing that it does not support a finding of coal mine dust induced disease.

Contrary to employer's assertion, Dr. James diagnosed COPD, and opined that coal mine dust exposure was a contributing factor in the development of this disease, Claimant's Exhibit 1, and he was aware of claimant's employment in the ranching business, Employer's Exhibit 15 at 24, 45. We therefore reject employer's argument.

Employer asserts that it was irrational for the administrative law judge to find Dr. Farney's opinion not well-reasoned because she disagreed with the physician's statement that claimant had minimal exposure to coal dust. We disagree. The administrative law judge may give less weight to a medical opinion where that opinion is based on an underlying premise that is incorrect.[2] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *see also Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988)(administrative law judge properly found medical opinion entitled to less weight in view of discrepancy between smoking history testified to by claimant and that relied upon by physician). Because the administrative law judge provided a valid basis for finding Dr. Farney's opinion regarding the existence of pneumoconiosis entitled to little weight, we need not consider employer's other assertions regarding this opinion pursuant to Section 718.202(a)(4). *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

Employer also argues that the administrative law judge's deference to Dr. Morgan's opinion is based on an "ill-conceived premise of a 'treating physician rule.'" Employer's Brief at 17. In assessing the evidence at Section 718.202(a)(4), the administrative law judge noted the language of 20 C.F.R. §718.104, and stated that based on Dr. Morgan's frequent treatment of claimant, including periods of claimant's hospitalizations, the physician "was in a unique position to render an opinion in this matter and, if found credible, his opinion may be entitled to controlling weight in this matter." Decision and Order at 23. In weighing all of the medical opinion evidence, the administrative law judge stated that "Dr. Morgan was Claimant's treating physician and had the benefit of observing and evaluating Claimant's condition on a regular basis over a lengthy period of time." *Id.* at 25. While the administrative law judge relied, in part, on the treating status of Dr. Morgan in weighing the evidence, the administrative law judge also found that the preponderance of the well-reasoned and well-documented medical opinions supported a finding of legal pneumoconiosis pursuant to Section 718.202(a)(4). We affirm the administrative law judge's finding at Section 718.202(a)(4), based on her finding as to the preponderance of the medical opinion evidence. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 114 S.Ct. 2251, 18 BLR 2A-1 (1994). In addition, the

[2] Based on the record, the administrative law judge found that claimant was exposed to "moderate to heavy amounts of coal mine dust on a regular basis." Decision and Order at 24.

administrative law judge adequately considered the criteria contained in Section 718.104 in finding Dr. Morgan's opinion entitled to added weight. 20 C.F.R. §718.104(d).

Employer's remaining arguments regarding the administrative law judge's findings pursuant to Section 718.202(a)(4) are tantamount to a request that the Board reweigh the evidence. We note that the instant case arises within the jurisdiction of the United States Courts of Appeals for the Tenth Circuit[3] which has declared that where "[t]he evidence was conflicting and, where medical professionals are in disagreement, the trier of fact is in a unique position to determine credibility and weigh the evidence." *Hansen v. Director, OWCP*, 984 F.2d 364, 370, 17 BLR 2-48, 2-59 (10th Cir. 1993).[4] The administrative law judge is charged with evaluating the evidence and determining whether the parties have met their burdens, *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984) and the Board cannot reweigh the evidence, *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Accordingly, we affirm the administrative law judge's finding that the evidence is sufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), as this finding is supported by substantial evidence.

20 C.F.R. §718.204(b)(2)(iv)

Employer challenges the administrative law judge's reliance on Dr. Morgan's opinion to find total disability established, contending that the administrative law judge ignored relevant parts of the opinion. We disagree. Because the administrative law judge was aware of Dr. Morgan's full opinion, including his statement that he would defer to the opinion of a pulmonary specialist to determine whether claimant's FEV1 result of 79% fell within the normal range, and whether it would be sufficient to allow claimant to perform manual labor, we reject employer's assertion that the administrative law judge ignored Dr. Morgan's statements in this regard. *See* Decision and Order at 11; Director's Exhibit 6; Claimant's Exhibit 1; Employer's Exhibit 12.

[3] The record indicates that claimant's coal mine employment occurred in Utah. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[4] The record indicates that claimant's coal mine employment occurred in Utah. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

Employer asserts that Dr. Poitras's opinion, that claimant's PO2 result of 60 would cause it to be difficult for claimant to do his coal mine employment, is inconsistent with the opinions of Drs. Farney, Fino, and James, who opined that claimant's blood gas studies were within normal limits. We disagree. Contrary to employer's assertion, Dr. Poitras's assessment of claimant's PO2 is not necessarily inconsistent with medical opinions stating that this is a value that falls within normal limits. As the administrative law judge found, claimant's PO2 value of 60 was from a qualifying blood gas study.[5] Decision and Order at 28.

Employer argues that Dr. James's concession, that there is no impairment shown by the pulmonary function study and blood gas study he administered, is contrary to the administrative law judge's finding of significant impairment on ventilatory function or blood gas transfer. Further, employer asserts that the administrative law judge selectively analyzed the evidence, as he discredited Dr. Fino for the same conclusions. These arguments are misplaced. The administrative law judge found Dr. James's opinion regarding disability to be unclear and entitled to little weight. Decision and Order at 27. In addition, we reject employer's assertion that the administrative law judge's decision to credit Dr. James's opinion regarding pneumoconiosis and causation, but not at disability and disability causation is "poorly explained and not supported by substantial evidence." Employer's Brief at 24. The administrative law judge must consider all relevant evidence regarding each element of entitlement, and determine whether medical opinions are reasoned and documented based on the issue in question. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Moreover, an administrative law judge may reasonably find a medical opinion credible for establishing one element of entitlement, but not another element of entitlement. *See Drummond Coal Co. v. Freeman*, 17 F.3d 361 (11th Cir. 1994).

Employer also challenges the administrative law judge's discrediting of Dr. Fino's opinion that claimant is not totally disabled. The administrative law judge found that Dr. Fino did not adequately explain his opinion of no disability, and therefore found it not as well-reasoned as the other opinions. *See Clark*, 12 BLR at 1-155. We affirm the administrative law judge's permissible finding that Dr. Fino's opinion was unconvincing.

Employer also asserts that there is no flaw in Dr. Farney's assessment of testing, and that therefore, the administrative law judge had no rational basis for discrediting this opinion. The administrative law judge found that Dr. Farney's understanding of the exertional requirements of claimant's usual coal mine employment, as requiring minimal

[5] A "qualifying" blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix C. *See* 20 C.F.R. §718.204(b)(2)(ii). A "non-qualifying" study exceeds those values.

effort, was contrary to her finding that as a bath house attendant, claimant was required to perform moderate labor, with occasional periods of heavy labor. Decision and Order at 26. We affirm the administrative law judge's decision to accord less weight to the opinion of Dr. Farney, as the administrative law judge reasonably determined that the physician's understanding of the exertional requirements of claimant's usual coal mine employment was flawed. *See Eagle v. Armco Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991).

The remainder of employer's arguments are tantamount to a request that the Board reweigh the evidence. The administrative law judge is charged with evaluating the evidence, and the Board cannot reweigh the evidence. *Anderson*, 12 BLR at 1-113; *Worley*, 12 BLR at 1-23. Accordingly, we affirm the administrative law judge's finding that the evidence is sufficient to establish the existence of total disability pursuant to Section 718.204(b)(2)(iv), as this finding is supported by substantial evidence.

20 C.F.R. §718.204(c)

Employer contends that Dr. James's opinion refutes the administrative law judge's finding of a disabling pulmonary impairment due to pneumoconiosis. The administrative law judge accorded greatest weight to the opinions of Drs. Poitras and Morgan, that claimant was totally disabled due to a pulmonary impairment caused by his coal mine employment, and she gave less weight to the contrary opinions of Drs. Fino and Farney. The Tenth Circuit has made plain that it is sufficient to establish causation if "the pneumoconiosis is at least a *contributing cause*. . . . ." *Mangus v. Director, OWCP*, 882 F.2d 1527, 1531, 13 BLR 2-9, 2-19 (10th Cir. 1989); s*ee* 65 Fed. Reg., 79920, 79946 (In promulgating 20 C.F.R. §718.204(c), the Department did not alter existing law.).

The administrative law judge stated "Because the opinion of Dr. James regarding the presence of a totally disabling pulmonary impairment is vague . . . any opinion he may have regarding the etiology of said impairment is accorded less weight." Decision and Order at 29, n.13. The administrative law judge reasonably found Dr. James's opinion entitled to little weight as it was unclear regarding disability. Therefore, we reject employer's assertion that Dr. James's opinion refutes the administrative law judge's finding of disability causation pursuant to Section 718.204(c).

Further, as the administrative law judge found, Dr. Fino did not diagnose pneumoconiosis or a totally disabling pulmonary impairment, contrary to the administrative law judge's findings. The administrative law judge therefore permissibly accorded less weight to the opinion of Dr. Fino's opinion at this subsection. *See Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986).

As this is the extent of the arguments regarding the administrative law judge's findings at Section 718.204(c), we affirm the administrative law judge's findings as supported by substantial evidence. *Hansen*, 989 F.3d at 370, 17 BLR at 2-59.

Responsible Operator challenge

Employer asserts that the administrative law judge erred by not dismissing it as the responsible operator in this case. Specifically, employer asserts that its right to due process has been violated by the destruction of the case file from claimant's prior claim, and that the administrative law judge therefore erred by not dismissing it as the responsible operator. Employer also contends that the administrative law judge should have followed the holding of the United States Court of Appeals for the Sixth Circuit in *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000), to dismiss employer.

As the administrative law judge correctly noted, the file of the earlier claim, which was apparently filed on March 31, 1980, was destroyed and all that remains is a memorandum to file notating that benefits had been denied. The memo also states that although the "evidence showed that [claimant] had coal worker's [sic] pneumoconiosis arising out of his over-10 years of coal mine employment, the evidence did not show that [he] was disabled by the disease at that time." Decision and Order at 17. The administrative law judge stated:

> I am not aware of any regulation that provides for the destruction of claim files in Black Lung cases. Nevertheless, the fact remains that the file was destroyed. All that is left is a computer entry in a government data base with no supporting documentation to verify the validity of the information. Moreover, we only have a memo to the file that summarizes that person's view of what was on the computer data base. The information contained within the memo is at least twice removed from the original source of the information (paper claim file) that is no longer available for examination. In addition, the statement in the memo regarding denial of benefits is vague. There is no accounting of exhibits, and, therefore, it is unknown what medical evidence was submitted in the first claim. It is not known what evidence was used to support a finding of pneumoconiosis and what evidence was used to ultimately deny benefits. I find that the only reliable use of this memo is to provide documentation that a prior claim had indeed been filed.

Id. at 17-18. The administrative law judge considered the *Holdman* decision, which she found distinguishable from the instant case, and she determined that employer's right to

due process was not violated by the destruction of the prior claim file. Therefore, the administrative law judge denied employer's motion to be dismissed. *Id*. at 19. The administrative law judge determined that the little information in the record concerning the basis for the denial of the prior claim was not reliable enough to determine the basis for the denial of that claim, and that the current claim "will be decided on the newly submitted evidence." *Id.* at 18.

Employer contends that the destruction of the prior case file results in a violation of its right to due process, as the record does not contain the prior evidence to compare with the newly submitted evidence to determine if claimant has shown a material worsening of his condition pursuant to *Wyoming Fuel Co. v. Director, OWCP* [*Brandolino*], 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996). Further, employer contends that the bases for the prior denial are not clear and that "the missing documents can no longer shed light, confirm, or refute opinions expressed in any preserved evidence." Employer's Brief at 9. Employer also notes that without the prior evidence, it is impossible to determine whether the claim was timely filed. The Director responds, contending that there has been no prejudice to employer.

If 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).

We reject employer's assertion that the material worsening analysis required by *Brandolino* cannot be performed. Because the instant claim was filed in 2002, the standard to be applied in this case is the subsequent claim standard contained in Section 725.309, which requires claimant to establish 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). Moreover, implicit in the administrative law judge's finding that the newly submitted evidence is sufficient to establish each element of entitlement, is a finding that claimant has established a change in at least one of the applicable conditions of entitlement. Further, claimant's continued employment, until 1993, well after the denial of his prior claim, would restart the time for filing a new claim. S*ee* 20 C.F.R. §725.308; *Brandolino*, 40 F.3d at 1507, 20 BLR at 2-312.

Further, we hold that the administrative law judge rationally distinguished the instant case from *Holdman*. Decision and Order at 18. As the administrative law judge found, in *Holdman*, the missing file contained the active claim. In the instant case, the missing file contains the prior claim, which had been closed. In addition, as noted by the

Director, in *Holdman*, the employer bore the burden of establishing rebuttal of the presumption of total disability due to pneumoconiosis, pursuant to 20 C.F.R. Part 727. In the instant case, arising under the regulations contained in 20 C.F.R. Part 718, claimant bears the burden of establishing each element of entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Consequently, we affirm the administrative law judge's finding that *Holdman* is distinguishable. In light of the foregoing, we affirm the administrative law judge's decision to deny employer's request to be dismissed as the responsible operator.

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