BRB No. 04-0169 BLA

ELNATHAN CONLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
U.S. STEEL MINING COMPANY	)	
	)	DATE ISSUED: 09/27/2004
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 of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

Patrick K. Nakamura (Nakamura, Quinn & Walls, LLP), Birmingham, Alabama, for claimant.

James N. Nolan (Walston, Wells, Anderson & Bains, LLP), Birmingham, Alabama, for employer.

Michelle S. Gerdano (Howard Radzely, Solicitor of Labor; Donald S. Shire, 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 (02-BLA-5458) of Administrative Law Judge Robert J. Lesnick awarding benefits 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] This case involves a subsequent claim filed on September 24, 2001.[2] After crediting claimant with 41.3 years of coal mine employment, the

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[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] The relevant procedural history of this case is as follows: Claimant initially filed a claim for benefits on August 13, 1987. Director's Exhibit 1. On October 7, 1987, the district director issued a Notice of Abandonment, informing claimant that his claim would be denied by reason of abandonment if he did not take specified action within thirty days. *Id.* By letter dated November 18, 1987, the district director notified claimant that, because he had not complied with the requirements set forth in the Notice of Abandonment, his claim was denied by reason of abandonment pursuant to 20 C.F.R. §725.409 (2000).

Claimant filed a second claim on October 30, 1992. Director's Exhibit 2. On January 15, 1993, the district director found, *inter alia*, that the evidence was insufficient to establish (1) that claimant suffered from pneumoconiosis (black lung disease); (2) that the disease was caused at least in part by coal mine work; and (3) that claimant was totally disabled by the disease. *Id.* The district director, therefore, denied benefits. *Id.* Claimant filed a third claim on November 1, 1993. *Id.* Because claimant's 1993 claim was filed within one year of the issuance of the district director's last denial of his 1992 claim, the district director properly found that claimant's 1993 claim constituted a timely request for modification pursuant to 20 C.F.R. §725.310 (2000). *See Stanley v. Betty B Coal Co.*¸ 13 BLR 1-72 (1990). In a Proposed Decision and Order dated March 16, 1994, the district director denied claimant's request for modification. *Id.* There is no indication that claimant took any further action in regard to his 1992 claim.

Claimant filed a fourth claim on August 4, 1997. Director's Exhibit 3. On January 6, 1998, the district director found that the evidence was insufficient to establish (1) that claimant suffered from pneumoconiosis (black lung disease); (2) that the disease was caused at least in part by coal mine work; and (3) that claimant was totally disabled by the disease. *Id.* The district director also found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Id.* The district director, therefore, denied benefits. *Id.* After claimant submitted additional

administrative law judge found that the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge, therefore, found that that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[3] Turning to the merits of claimant's 2001 claim, the administrative law judge found that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). Although the administrative law judge found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) and (iii), he found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (iv). The administrative law judge, therefore, found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2). He also found the evidence sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits. On appeal, employer contends that the administrative law judge erred in finding the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Employer also contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis. Employer further argues that the administrative law judge erred in finding the evidence sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant responds in support of the administrative law judge's award of benefits. In a reply brief, employer reiterates its previous contentions. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, contending that because the administrative law judge properly found that the evidence was sufficient to establish that one of the applicable conditions of entitlement had changed, the administrative law judge properly considered the merits of claimant's 2001 claim.[4]

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evidence, the district director again denied benefits on May 15, 1998. *Id.* There is no indication that claimant took any further action in regard to his 1997 claim.

Claimant filed a fifth claim on September 24, 2001. Director's Exhibit 4.

[3] As discussed *infra*, the administrative law judge mistakenly characterized this claim as a "duplicate" claim rather than a "subsequent" claim.

[4] Because no party challenges the administrative law judge's finding regarding the length of claimant's coal mine employment or his findings pursuant to 20 C.F.R. §§718.203(b) and 718.204(b), these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Employer contends that the administrative law judge erred in finding the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Employer contends that, in order to establish a material change in conditions, claimant should have been required to demonstrate a "genuine change in physical condition" since the denial of his last claim. Employer also argues that the administrative law judge erred in failing to make a determination as to whether claimant's condition had actually worsened since the earlier denial.

Employer and the administrative law judge failed to recognize that claimant's 2001 claim is subject to adjudication under the amended regulations. Consequently, the "material change" standard set out at 20 C.F.R. §725.309 (2000) is not applicable. As the Director accurately notes, claimant's 2001 claim is considered a "subsequent" claim under the amended regulations. *See* 20 C.F.R. §725.309(d). The amended regulations provide that a subsequent claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement[5] has changed since the date upon which the order denying the prior claim became final. *Id.* Upon review of claimant's prior claims and consideration of the previously submitted evidence, the administrative law judge recognized that the existence of pneumoconiosis was an element of entitlement that was previously adjudicated against claimant.[6] *See* Decision and Order at 9; Director's Exhibit 3. The Director accurately notes that the revised regulations do not require an administrative law judge to determine if there is a qualitative difference between the previously submitted evidence and the newly submitted evidence. The administrative law judge found that the newly submitted x-ray evidence was sufficient to establish the

[5] The regulations provide that a miner, in order to satisfy the requirements for entitlement to benefits, must establish the existence of pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; that he is totally disabled; and that pneumoconiosis contributed to his total disability. 20 C.F.R. §725.202(d).

[6] The district director denied benefits on claimant's 1997 claim because she found that the evidence was insufficient to establish (1) that claimant suffered from pneumoconiosis (black lung disease); (2) that the disease was caused at least in part by coal mine work; and (3) that claimant was totally disabled by the disease. Director's Exhibit 3.

existence of pneumoconiosis. Because no party challenges this finding, it is affirmed.[7] *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Thus, because claimant has established that one of the applicable conditions of entitlement (the existence of pneumoconiosis) has changed since the denial of his 1997 claim,[8] the administrative law judge properly considered the merits of claimant's 2001 claim. *See* 20 C.F.R. §725.309.

In his consideration of the merits of claimant's 2001 claim, the administrative law judge noted that claimant was entitled to a review of all of the evidence in his prior claims. Decision and Order at 4. However, having found that the newly submitted x-ray evidence established the existence of pneumoconiosis, thereby establishing a change in a condition of entitlement, the administrative law judge found that it was unnecessary to consider the previously submitted x-ray evidence. *Id.* Because no party asserts that the administrative law judge erred in failing to specifically address the previously submitted x-ray evidence, we affirm the administrative law judge's implicit finding that the x-ray evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

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[7] The newly submitted x-ray evidence consists of five interpretations of three x-rays taken on September 23, 1997, January 15, 2002 and May 8, 2002. In his consideration of whether the newly submitted x-ray evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge acted within his discretion in according the greatest weight to the x-ray interpretations rendered by physicians dually qualified as B readers and Board-certified radiologists. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 8. All of the x-ray interpretations rendered by physicians dually qualified as B readers and Board-certified radiologists are positive for pneumoconiosis. Director's Exhibit 11; Claimant's Exhibits 1, 2. Moreover, three of the five newly submitted x-ray interpretations are positive for pneumoconiosis. Thus, the administrative law judge's finding that the newly submitted x-ray evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) is also supported by substantial evidence.

[8] Because Section 718.202(a) provides four alternative methods by which a claimant may establish the existence of pneumoconiosis, *see Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985), the administrative law judge was not required to weigh the newly submitted x-ray and the newly submitted medical opinion evidence together. *But see Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Consequently, we need not address employer's contention that the administrative law judge erred in finding that all of the newly submitted evidence, when weighed together, was sufficient to establish the existence of pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Employer also argues that the administrative law judge erred in finding that Dr. Shad's opinion was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction this case arises, has held that a claimant need only prove that his pneumoconiosis was a substantial contributor to his total disability. *See Lollar v. Alabama By-Products*, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990). Revised Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, 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:
>
> (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).

Contrary to employer's contention, Dr. Shad's opinion is sufficient to support a finding that claimant's total disability was due to his pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge accurately noted that Dr. Shad opined that claimant's pneumoconiosis and restrictive lung disease were the "main contributors" to his totally disabling respiratory impairment. Decision and Order at 11; Director's Exhibit 11. Because Dr. Shad opined that claimant's pneumoconiosis was a

"main contributor" to his totally disabling respiratory impairment, the administrative law judge permissibly found that Dr. Shad's opinion supported a finding that claimant's pneumoconiosis had a "material adverse effect" on his respiratory condition and was, therefore, a "substantially contributing cause" of his disability. Decision and Order at 11-12. Employer's remaining statements neither raise any substantive issue nor identify any specific error on the part of the administrative law judge in determining that the evidence is sufficient to establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Consequently, we affirm the administrative law judge's finding that the evidence is sufficient to establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *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).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge