BRB No. 06-0460 BLA

JOSEPHINE KARNELY (Widow of TONY KARNELY) Claimant-Petitioner v. U.S. STEEL MINING COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/27/2007 DECISION and ORDER

Appeal of the Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman (Wilderman & Linnet, P.C.), Denver, Colorado, for claimant.

William J. Evans and John P. Ball (Parsons Behle & Latimer), Salt Lake City, Utah, for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order (04-BLA-6099) of Administrative Law Judge Richard K. Malamphy denying benefits on claims filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30

[1] Claimant is the surviving spouse of the deceased miner, who died on March 18, 2003. Director's Exhibit 35.

U.S.C. §901 *et seq*. (the Act).[2] This case involves a miner's duplicate claim filed on September 7, 2000[3] and a survivor's claim filed on August 7, 2003. After crediting the miner with forty years of coal mine employment, the administrative law judge found that the evidence did not establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Accordingly, the administrative law judge denied benefits in the miner's claim. In regard to claimant's survivor's claim, the administrative law judge found that the evidence did not establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a). Accordingly, the administrative law judge also denied benefits in the survivor's claim.

On appeal, claimant argues that the administrative law judge erred in finding that the evidence did not establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Claimant also argues that the administrative law judge erred in finding that the evidence did not establish the existence of "legal" pneumoconiosis. 20 C.F.R. §§718.201, 718.202(a)(4). Employer responds in support of the administrative law judge's denial of benefits. In a reply brief, claimant reiterates her previous contentions. The Director, Office of Workers' Compensation Programs (the Director), has not filed a response brief.

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).

Claimant argues that the administrative law judge failed to apply the proper standard for determining whether claimant established a material change in conditions. Where a claimant files a claim 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 there has been a material change in conditions. 20 C.F.R. §725.309

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[2] 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.

[3] The miner initially filed a claim for benefits on April 17, 1995. Director's Exhibit 22. The district director denied benefits on August 7, 1995 because the miner did not establish the existence of pneumoconiosis or that his total disability was due to pneumoconiosis. *Id.* There is no indication that the miner took any further action in regard to his 1995 claim. The miner filed a second claim on September 7, 2000. Director's Exhibit 1.

(2000). The United States Court of Appeals for the Tenth Circuit, within whose jurisdiction this case arises, has held that to establish a material change in conditions, a claimant must prove, for each element that actually was decided adversely to the claimant in the prior denial, that there has been a material change in that condition since the prior claim was denied.[4] *See Wyoming Fuel Co. v. Director, OWCP [Brandolino]*, 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996).

In the present case, the district director considering the miner's 1995 claim found that the evidence did not establish (1) that the miner suffered from pneumoconiosis (black lung disease); (2) that the disease was caused at least in part by coal mine work; and (3) that the miner was totally disabled by the disease. Director's Exhibit 22. In order to determine whether the miner met the threshold requirement of proving a material change in his conditions, the administrative law judge should have considered whether, comparing evidence obtained after the prior denial to the evidence considered in or available at the time of his prior claim, claimant demonstrated that each of the elements

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[4] The United Stated Court of Appeals for the Tenth Circuit has held that:

> In order to meet the claimant's threshold burden of proving a material change in a particular element, the claimant need not go as far as proving that he or she now satisfies the element. Instead, under the plain language of the statute and regulations, and consistent with res judicata, the claimant need show only that this element has worsened materially since the time of the prior denial. As an example of how a claimant might show a condition has worsened materially, the claimant might offer to compare past and present x-rays reflecting that any conditions suggesting that the claimant has pneumoconiosis have become materially more severe since the claim was rejected. As another example, the claimant might present more extreme blood gas test results obtained since the prior denial to indicate that his or her disability has become materially more severe since the last claim was rejected. However, a new interpretation of an old x-ray that was taken before the prior denial or a further blood gas result identical to results considered in the prior denial does not demonstrate that a miner's condition has materially changed.

Wyoming Fuel Co. v. Director, OWCP [Brandolino], 90 F.3d 1502, 1511, 20 BLR 2-302, 2-320 (10th Cir. 1996) (footnotes omitted).

previously found against the miner had worsened materially since the prior denial.[5]

In his consideration of the miner's 2000 duplicate claim, the administrative law judge stated:

> The [district director] denied [the miner's 1995 claim] after [he] determined that [the miner] had not established the presence of pneumoconiosis arising from coal mine employment, and that, therefore, it did not cause his disability. DX 22. Thus, the important threshold determination I must make is whether [the miner's] disability, which is undisputed, arose from pneumoconiosis after the 1995 claim based on the new evidence submitted in the subsequent living miner's claim.

Decision and Order at 7.

The administrative law judge found that the evidence obtained after the denial of the miner's 1995 claim showed that the miner's "disability and general condition worsened over the years between his first and subsequent claim."[6] Decision and Order at 19. However, the administrative law judge found that there was not sufficient medical evidence to establish that the miner suffered from clinical or legal pneumoconiosis. *Id.* at 18-19. The administrative law judge, therefore, found that claimant did not establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Id.* at 19.

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[5] The Tenth Circuit has noted that:

> One of the elements of proving a successful claim for benefits is showing that any pneumoconiosis arose at least in part out of coal mine employment. See 20 C.F.R. §718.203. Unlike the other two elements of a benefits claim--the existence of pneumoconiosis and total disability--this element is not technically progressive; a claimant's pneumoconiosis either did or did not arise out of coal mine work. Therefore, this element has no meaning in a context where the claimant has been found not to have pneumoconiosis and a claimant need not demonstrate a material change in this element when the [administrative law judge] in his prior claim decided the claimant did not yet have pneumoconiosis.

Brandolino, 90 F.3d at 1512 n.17, 20 BLR at 2-321 n.17.

[6] The administrative law judge noted that it was indisputable that the miner had "very poor health and suffered from severe pulmonary problems." Decision and Order at 19.

We agree with claimant that the administrative law judge did not apply the proper material change standard. *See* Claimant's Brief at 3-4. Instead of determining whether the newly submitted evidence established the existence of pneumoconiosis, the administrative law judge should have determined whether, comparing evidence obtained after the prior denial to the evidence considered in or available at the time of his prior claim, claimant demonstrated that the miner's chronic obstructive pulmonary disease, which some doctors said arose out of coal mine employment, had become materially more severe since the prior denial. *See Brandolino*, 90 F.3d at 1512 n.19, 20 BLR at 2-322 n.19. In *Brandolino*, as in the case at bar, claimant sought to establish the existence of legal pneumoconiosis. The *Brandolino* court explained that, to show a material worsening in the pneumoconiosis element, Mr. Brandolino had to present evidence that his chronic bronchitis worsened materially. *Id.* Here, claimant presented evidence that the miner's chronic obstructive pulmonary disease/emphysema had worsened. Such evidence, if credited, would be sufficient; claimant need not establish legal pneumoconiosis to show a material change in conditions.

Should the administrative law judge find that the miner's chronic obstructive pulmonary disease worsened since the prior denial, claimant will have established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Under these circumstances, the administrative law judge is required to consider claimant's 2000 claim on the merits, based on a weighing of all of the evidence of record. *See Shupink v. LTV Steel Corp.*, 17 BLR 1-24 (1992).Consequently, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §725.309 (2000), and remand the case for further consideration.

In the interest of judicial economy, we will address claimant's contentions regarding the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of "legal" pneumoconiosis.[7] 20

[7] The administrative law judge found that the x-ray evidence did not establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(1). Because no party challenges this finding, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 7 BLR 1-710 (1983). Because there is no biopsy or autopsy evidence of record, claimant is precluded from establishing that the miner suffered from pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Claimant is not entitled to any of the statutory presumptions arising under 20 C.F.R. §718.202(a)(3). Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because the miner filed his duplicate claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, because the miner died after March 1, 1978, the Section 718.306 presumption is also inapplicable. *See* 20 C.F.R. §718.306.

C.F.R. §§718.201, 718.202(a)(4). In considering whether the medical opinion evidence established the existence of "legal" pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Poitras, Horwitz, and Farney. Drs. Poitras and Horwitz opined that the miner's chronic obstructive pulmonary disease was due to both cigarette smoking and coal dust exposure. Director's Exhibits 7, 8; Claimant's Exhibits 1, 6. These opinions, if credited, support a finding of "legal" pneumoconiosis.[8] Dr. Farney opined that the miner's chronic obstructive pulmonary disease was due solely to his cigarette smoking. Employer's Exhibits 1, 4. In finding that the evidence did not establish the existence of "legal" pneumoconiosis, the administrative law judge credited Dr. Farney's opinion over the contrary opinions of Drs. Poitras and Horwitz. *See* Decision and Order at 18-19.

Claimant initially argues that the administrative law judge erred in according less weight to Dr. Poitras's opinion. We agree. The administrative law judge accorded less weight to Dr. Poitras's opinion because he found that it was equivocal and based upon a discredited x-ray interpretation. Decision and Order at 18-19. Contrary to the administrative law judge's characterization, Dr. Poitras did not equivocate as to the cause of the miner's chronic obstructive pulmonary disease. In three separate reports dated October 16, 2000, March 1, 2001, and March 7, 2001, Dr. Poitras clearly and unequivocally attributed the miner's chronic obstructive pulmonary disease to both his cigarette smoking and coal dust exposure.[9] *See* Director's Exhibits 7, 8. Consequently, the administrative law judge erred in his consideration of Dr. Poitras's medical opinion. *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Claimant also argues that the administrative law judge erred in crediting Dr. Farney's opinion over that of Dr. Horwitz. The administrative law judge accorded less weight to Dr. Horwitz's opinion, that the miner's chronic obstructive pulmonary disease was due to both cigarette smoking and coal dust exposure, because he found that the doctor's opinion was based on three things: (1) the miner's own opinion that coal dust was responsible for his breathing problems; (2) a note from the miner's co-worker

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[8] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[9] In finding Dr. Poitras's opinion equivocal, the administrative law judge noted that the doctor stated "the [chest x-ray] supports early pneumoconiosis, I believe." Decision and Order at 18; Director's Exhibit 7. However, this statement focuses on the existence of clinical pneumoconiosis, not legal pneumoconiosis. Moreover, the fact that the x-ray relied upon by Dr. Poitras was interpreted as negative for clinical pneumoconiosis does not undermine Dr. Poitras's diagnosis of legal pneumoconiosis.

describing the miner's work conditions; and (3) the doctor's view that the miner's smoking history was "moderate." *See* Decision and Order at 19.

Dr. Horwitz, the miner's treating physician from 1998 until his death in 2003, noted, as part of the miner's self-reported history, that the miner "emphasiz[ed] that coal dust was largely responsible for his breathing problems." Claimant's Exhibit 1. However, contrary to the administrative law judge's characterization, there is no indication that Dr. Horwitz based his opinion regarding the etiology of the miner's chronic obstructive pulmonary disease upon the miner's own assessment. Instead, Dr. Horwitz explained that he based his opinion on the totality of his clinical findings, including the miner's history, physical examination, and test results. *See* Claimant's Exhibit 1.

Similarly, in referencing a note from one of the miner's co-workers, Dr. Horwitz commented that the extent of the described occupational exposure would likely result in lung damage. Claimant's Exhibit 1. Again, there is no indication that Dr. Horwitz based his opinion regarding the etiology of the miner's chronic obstructive pulmonary disease upon the co-worker's description of the miner's work conditions. Instead, Dr. Horwitz found that the co-worker's statement indicated that the miner was exposed to significant amounts of coal dust.

Finally, the administrative law judge accorded less weight to Dr. Horwitz's opinion because the doctor characterized the miner's smoking history as "moderate." In addressing the miner's smoking history, the administrative law judge stated:

> [Claimant]…indicated that while [the miner] had smoked until 1990, he was not a chain smoker, and never smoked a full pack a day. [Transcript] at 73. The medical records indicate a smoking history of about forty years.

Decision and Order at 5. In his April 1, 2005 report, Dr. Horwitz noted that the miner smoked "nearly a pack per day of cigarettes, for about forty years." Claimant's Exhibit 1. Dr. Farney relied upon a similar smoking history.[10]

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[10] Dr. Farney noted that:

> [The miner] smoked approximately one pack of cigarettes/day from age 30 (1953) until age 69, discontinuing in 1992 (7 years after retirement). There is also some indication that he began smoking as early as 1945, quitting in 1992, a period of 47 years, during which he smoked less than a pack per day. I have assumed a 39 pack-year history.

Employer's Exhibit 1.

The administrative law judge credited Dr. Farney's opinion over that of Dr. Horwitz, finding that Dr. Farney's statement that the "miner's smoking history was extensive and abundantly sufficient to account for the entirety of his pulmonary impairment and symptoms" more accurately reflected the record before him. Decision and Order at 19. There is no indication that Dr. Horwitz relied upon an inaccurate smoking history. In fact, both Dr. Horwitz and Dr. Farney relied upon similar smoking histories that corresponded to the administrative law judge's finding regarding the length and extent of the miner's smoking history. The significance of the miner's smoking history in causing the miner's chronic obstructive pulmonary disease is a medical determination. By independently assessing the significance of the miner's smoking history, the administrative law judge improperly substituted his opinion for that of the medical experts. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). In light of the above-referenced errors, we vacate the administrative law judge's finding that the medical opinion evidence does not establish the existence of "legal" pneumoconiosis.[11] 20 C.F.R. §718.202(a)(4).

The administrative law judge similarly erred in his consideration of the survivor's claim. He denied claimant's survivor's claim because he found that the evidence did not establish the existence of pneumoconiosis. Decision and Order at 19-20. In light of our decision to vacate the administrative law judge's finding that the evidence did not establish the existence of "legal" pneumoconiosis, we also vacate the administrative law judge's denial of claimant's survivor's claim.

Finally, claimant contends that the administrative law judge erred in not considering Dr. Poitras's opinion in his adjudication of the survivor's claim. Claimant argues that Dr. Poitras's reports are not subject to the evidentiary limitations set forth at 20 C.F.R. §725.414,[12] because these reports were obtained by the Director. *See*

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[11] Claimant argues that the administrative law judge should have accorded greater weight to Dr. Horwitz's opinion based upon his status as the miner's treating physician. On remand, the administrative law judge is instructed to consider whether Dr. Horwitz's opinion is entitled to additional weight based upon his status as the miner's treating physician in light of the factors set out at 20 C.F.R. §718.104(d).

Although the administrative law judge noted that Dr. Poitras was Board-certified in Internal Medicine and that Dr. Farney was Board-certified as a pulmonary specialist, the administrative law judge noted only that Dr. Horwitz was "a specialist in internal medicine." Decision and Order at 13-14. The record reveals that Dr. Horwitz is Board-certified in Internal Medicine. *See* Claimant's Exhibit 2.

[12] The evidentiary limitations set forth at 20 C.F.R. §725.414 apply only to the survivor's claim. Because the miner's claim was filed before 2001, it is not subject to the

Claimant's brief at 10. We disagree. Dr. Poitras's reports were submitted in connection with the miner's claim. When a living miner files a subsequent claim, all the evidence from the first miner's claim is specifically made part of the record. *See* 20 C.F.R. §725.309(d)(1). Such an inclusion is not automatically available, however, in a survivor's claim filed pursuant to the revised regulations. Consequently, the medical evidence from the prior living miner's claims must be designated as evidence by one of the parties in order for it to be included in the record in the survivor's claim. *See Keener v. Peerless Eagle Coal Co.*, BLR , BRB No. 05-1008 BLA (Jan. 26, 2007) (*en banc*). In support of her affirmative case in the survivor's claim, claimant did not designate any of Dr. Poitras's reports as one of her two medical reports.[13] 20 C.F.R. §725.414(a)(2)(i). Therefore, the administrative law judge did not err in declining to consider Dr. Poitras's report in the survivor's claim.

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evidentiary limitations. Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties can submit into the record. 20 C.F.R. §§725.414; 725.456(b)(1). The applicable provision limited claimant to "no more than two medical reports" in support of her affirmative case. 20 C.F.R. §725.414(a)(2)(i). Medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1).

[13] In her pre-hearing report, claimant designated Dr. Poitras's reports as evidence in the miner's claim, but did not designate these reports as evidence in the survivor's claim.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge