BRB No. 97-1250 BLA

ROY E. VANN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JIM WALTER RESOURCES, INCORPORATED	)	DATE ISSUED:
	)	
	)	
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 Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

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

Stephen E. Brown (Maynard, Cooper & Gale), Birmingham, Alabama, for employer.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (96-BLA-835) of Administrative Law Judge Gerald M. Tierney 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). This case involves a duplicate claim.[1] The administrative law judge

[1] Claimant filed his first claim on April 1, 1982. Director's Exhibit 27. This claim was denied and the denial was ultimately affirmed by the Board as the administrative law judge properly determined that claimant had not established total disability. *Vann v. Jim Walter Resources, Inc.*, BRB No. 86-824 BLA (Nov. 30, 1988). On October 21, 1991, claimant filed a second claim. Director's Exhibit 26. This claim was denied for failure to

noted that the parties had stipulated to thirty-four and one-half years of coal mine employment and then considered the evidence submitted by claimant subsequent to the previous denial of benefits. The administrative law judge found that this new evidence contained x-ray interpretations of complicated pneumoconiosis, which if credited, would lead to the irrebuttable presumption that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.304. *See* 30 U.S.C. §921(c)(3). Thus, the administrative law judge found that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309. The administrative law judge then considered the claim on its merits and credited the most recent x-ray interpretations which diagnosed claimant as suffering from complicated pneumoconiosis. The administrative law judge found that claimant was therefore entitled to the Section 718.304 presumption. Accordingly, benefits were awarded. The administrative law judge found that the date of onset of disability could not be determined and ordered that the benefits be payable as of December 1, 1994, the beginning of the month in which the most recent claim was filed. Employer challenges these findings, contending that the administrative law judge erred in his consideration of the x-ray evidence, and therefore, erred in concluding that claimant established a material change in conditions. Claimant responds, urging affirmance. The Director has indicated that he will not respond to claimant's appeal.[2]

The Board's scope of review is defined by statute. We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20

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establish a material change in conditions pursuant to 20 C.F.R. §725.309. *Id*. No further action was taken by claimant until the filing of the present claim on December 23, 1994. Director's Exhibit 1.

[2] The administrative law judge's determination regarding onset of disability is affirmed as it is unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant to establish any of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order, 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 therein. Employer contends that the administrative law judge erred in crediting Dr. Sargent's x-ray interpretation of complicated pneumoconiosis dated March 7, 1995 because the physician made additional comments noted on the form which would indicate that Dr. Sargent's diagnosis was equivocal. Petition for Review at 7; Director's Exhibit 11. Employer further contends that without Dr. Sargent's reading, claimant cannot sustain his burden of proof in establishing complicated pneumoconiosis by a preponderance of the evidence.[3] Petition for Review at 7. Employer also challenges the administrative law judge's decision to accord greater weight to the most recent x-ray as it fails to demonstrate a worsening in claimant's condition.[4] Lastly, employer contends that without the benefit of the Section 718.304 presumption, claimant cannot establish total disability because the new objective tests are non-qualifying and the medical opinion evidence fails to indicate that claimant is totally disabled.

[3] The record contains two additional interpretations of the March 7, 1995 x-ray. Dr. Goldstein indicated that claimant suffers from simple pneumoconiosis, 1/1, and Dr. Cole diagnosed simple pneumoconiosis, 1/2 and complicated pneumoconiosis, category A. Director's Exhibits 10, 12.

[4] Employer argues that the earlier x-ray interpretations ranged from 1/1 to 3/2, whereas the current x-ray interpretations of the March 7, 1995 x-ray read by Drs. Goldstein, Cole and Sargent, appear to show an improvement in the small opacities because the readings are 1/1 and 1/2. Director's Exhibits 10-12, 26-27.

Initially, we note that employer does not challenge the administrative law judge's weighing of Dr. Cole's x-ray interpretation, which found that claimant suffers from complicated pneumoconiosis, category A. Dr. Cole's reading alone is sufficient to establish a material change in conditions pursuant to Section 725.309 because, if credited, it could establish an element of entitlement previously adjudicated against claimant. *See Shupink v. LTV Steel Corp.*, 17 BLR 1-24 (1992).

With regard to the administrative law judge's consideration of Dr. Sargent's x-ray reading, the administrative law judge was not required at Section 718.202(a)(1) to consider the accompanying statements made by the physician on his x-ray reading, and therefore, permissibly accepted Dr. Sargent's notation on the United States Department of Labor's Roentgenographic Interpretation Form that claimant has complicated pneumoconiosis, category A. *See* 20 C.F.R. §718.202(a)(1); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). We also reject employer's contention that the administrative law judge erred in according greater weight to the most recent x-ray because the administrative law judge acted rationally in concluding that the diagnoses of complicated pneumoconiosis indicated a worsening of claimant's condition. *See Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Pate v. Alabama By-Products Corp.*, 6 BLR 1-636 (1983); *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983); *see also Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). We also affirm the administrative law judge's decision to accord greater weight to the readings by Drs. Cole and Sargent over Dr. Goldstein because they were dually qualified as board-certified radiologists and B-readers. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Trent, supra*; *Aimone v. Morrison Knudson Co.*, 8 BLR 1-32 (1985); *Goss v. Eastern Associated Coal Corp.*, 7 BLR 1-400 (1984). Thus, as the administrative law judge determined that claimant established complicated pneumoconiosis, he properly concluded that claimant had established the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *Trent, supra*. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson, supra*. We therefore affirm the administrative law judge's award of benefits as it is supported by substantial evidence and in accordance with law.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge