BRB No. 99-1303 BLA

CAS WILLIAMS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
U.S. STEEL MINING COMPANY, INCORPORATED	)	
	)	
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.

Michael E. Bevers (Nakamura, Quinn & Walls LLP), Birmingham, Alabama, for claimant.

James N. Nolan (Ogletree, Deakins, Nash, Smoak & Stewart, P.C.), Birmingham, Alabama, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (98-BLA-1284) 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). The instant case involves a duplicate

claim filed on October 10, 1997. The administrative law judge initially found that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. The administrative law judge, therefore, considered claimant's 1997 claim on the merits. After crediting claimant with at least thirty-one years of coal mine employment, the administrative law judge found that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also 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). The administrative law judge further found that the evidence was sufficient to establish that claimant was totally

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[1]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits with the Social Security Administration (SSA) on June 28, 1973. Director's Exhibit 22. The SSA denied the claim on September 24, 1973. *Id.* Claimant filed a claim with the Department of Labor (DOL) on September 25, 1975. *Id.* Claimant filed an election card on April 5, 1978, electing DOL review of his first claim. *Id.* These claims merged for purposes of review. In a Decision and Order dated July 23, 1985, Administrative Law Judge Tom M. Allen found that claimant did not suffer from pneumoconiosis. Judge Allen, therefore, denied benefits. *Id.* There is no indication that claimant took any further action in regard to his 1973 or 1975 claims.

Claimant filed a third claim on October 20, 1986. Director's Exhibit 22. In a Decision and Order dated June 25, 1992, Administrative Law Judge Kenneth A. Jennings found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). *Id.* Judge Jennings also found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). *Id.* Judge Jennings, therefore, denied benefits. *Id.* By Decision and Order dated February 23, 1994, the Board affirmed Judge Jennings' finding that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). *Williams v. U.S. Steel Mining Co.*, BRB No. 92-2197 BLA (Feb. 23, 1994) (unpublished).

Claimant filed a request for modification on August 18, 1995. Director's Exhibit 22. The district director denied claimant's request for modification as untimely filed on August 22, 1995 and May 7, 1996. *Id.* Claimant subsequently requested a hearing before the Office of Administrative Law Judges. *Id.* After a hearing was scheduled, claimant requested that his request for modification be withdrawn. *Id.* By Order dated June 16, 1997, Administrative Law Judge Gerald M. Tierney dismissed claimant's claim. *Id.*

Claimant filed a fourth claim on October 10, 1997. Director's Exhibit 1.

disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c). Accordingly, the administrative law judge awarded benefits. On appeal, employer argues 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. Employer also challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, 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).

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. Section 725.309 provides that a duplicate claim is subject to automatic denial on the basis of the prior denial, unless there is a determination of a material change in conditions since the denial of the prior claim. 20 C.F.R. §725.309(d). This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, which has not declared the standard to apply in determining if a claimant has established a material change in conditions. The Board has held that in cases arising in circuits where the United States Courts of Appeals have not yet addressed the standard applicable under Section 725.309, a claimant, in order to establish a material change in conditions, must establish by a preponderance of the evidence developed subsequent to the denial of the prior claim at least one of the elements of entitlement previously adjudicated against him. *See Allen v. Mead Corp.*, 22 BLR 1-63 (2000) (*en banc*).

In denying claimant's 1986 claim, Administrative Law Judge Kenneth A. Jennings found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and total disability pursuant to 20 C.F.R. §718.204(c). Director's Exhibit 22. The Board subsequently affirmed Judge Jennings' denial of benefits. *Williams v. U.S. Steel Mining Co.*, BRB No. 92-2197 BLA (Feb. 23, 1994) (unpublished). Consequently, in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309, the newly submitted evidence must support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or a finding of total disability pursuant to 20 C.F.R. §718.204(c).

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[2]Inasmuch as no party challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.203(b) and 718.204(b), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In the instant case, the administrative law judge found that the newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The record contains three newly submitted medical opinions. Dr. Hasson opined that claimant did not suffer from pneumoconiosis. Director's Exhibit 6. Dr. Rosemore, claimant's treating physician, opined that claimant suffered from chronic bronchitis and chronic obstructive pulmonary disease attributable to his coal dust exposure, a finding which the administrative law judge found supportive of a finding of pneumoconiosis pursuant to 20 C.F.R. §718.201. Decision and Order at 3; Director's Exhibit 19. Finally, Dr. Waldrum opined that claimant suffered from coal workers' pneumoconiosis. Claimant's Exhibit 1.

In considering whether the newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge accorded greater weight to Dr. Rosemore's opinion because as claimant's treating physician for more than ten years, he was in a better position to assess claimant's pulmonary condition. Decision and Order at 3; Director's Exhibit 19. This is proper. *See generally Schaaf v. Matthews*, 574 F.2d 157 (3d Cir. 1978); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985). The administrative law judge further noted that Dr. Waldrum, a Board-certified pulmonary specialist, also opined that claimant suffered from pneumoconiosis. Decision and Order at 3-4; Claimant's Exhibit 1. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is sufficient to establish the existence of pneumoconiosis. Consequently, we also affirm the administrative law judge's finding that the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. *See Allen, supra*.

In his consideration of the merits of claimant's 1997 claim, the administrative law judge noted that the most recent medical opinion evidence was the most probative evidence. The administrative law judge found that the preponderance of the most recent medical opinion evidence was sufficient to establish the existence of pneumoconiosis. Decision and Order at 4. The administrative law judge acted within his discretion in according greater weight to the opinions of Drs. Hasson, Rosemore and Waldrum based upon the recency of their physical examinations. *See Gillespie v. Badger Coal Co.*, 7 BLR 1-839 (1985); Decision and Order at 4. For the reasons discussed *supra*, we affirm the administrative law judge's finding that the medical opinion evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Employer contends that the administrative law judge erred in finding the medical opinion evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4). Dr. Hasson opined that claimant suffered from a mild pulmonary impairment. Director's Exhibit 6. Dr. Rosemore opined that claimant's pulmonary

function studies showed airway obstruction. Director's Exhibit 19. Dr. Rosemore further opined that claimant's coal mine employment required a level of exertion and respiratory capacity that claimant could no longer sustain for any length of time. *Id.* Dr. Waldrum opined that claimant's pulmonary function studies revealed a mild obstruction and a mild diffusion impairment. Claimant's Exhibit 1. Dr. Waldrum subsequently opined that claimant suffered from a total pulmonary disability. *Id*.

The administrative law judge found that, given the exertional requirements of claimant's usual coal mine employment, even a mild respiratory impairment would render claimant totally disabled. Inasmuch as this finding is unchallenged on appeal, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). The administrative law judge found that the assessments of Drs. Rosemore and Waldrum of a mild respiratory impairment, when considered in conjunction with the exertional requirements of claimant's former coal mine employment, supported a finding of total disability. *See Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *DeFelice v. Consolidation Coal Co.*, 5 BLR 1-275 (1982); Decision and Order at 5. Moreover, Dr. Hasson also found that claimant suffered from a mild impairment. *See* Director's Exhibit 6. Inasmuch as it is supported by substantial evidence, the administrative law judge's finding that the medical opinion evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) is affirmed.

An administrative law judge must weigh all the relevant evidence together, both like and unlike, in considering whether a claimant has established total disability pursuant to 20 C.F.R. §718.204(c). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). In the instant case, the administrative law judge found that the medical opinion evidence was not outweighed by the non-qualifying pulmonary function and arterial blood gas studies of record. Decision and Order at 6.

Employer argues that opinions of Drs. Rosemore and Waldrum are undermined by the non-qualifying pulmonary function and arterial blood gas studies of record. The administrative law judge, however, in weighing all of the evidence under 20 C.F.R. §718.204(c), acted within his discretion in finding that the medical opinion evidence was "the more reliable indicator of total disability." Decision and Order at 6. The administrative law judge specifically noted that both claimant's

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[3]Claimant indicated that his most recent coal mine employment was as a coal cutting machine operator. Director's Exhibit 3. As part of his duties, claimant would have to move a cable of six inches in diameter behind the machine. *Id.* Claimant indicated that he was required to lift twenty pounds 200 times per day and fifty to sixty pounds 64 to 70 times a day. *Id.* Claimant also testified that he was required to lift and set 150 pound timbers. Transcript at 13.

treating physician, Dr. Rosemore, and a Board-certified pulmonary specialist, Dr. Waldrum, had opined that claimant suffered from a totally disabling respiratory impairment. *Id.* We, therefore, affirm the administrative law judge's finding that the evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge