BRB No. 07-0989 BLA

T.H. Jr.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN COAL CORPORATION	)	
	)	DATE ISSUED: 09/29/2008
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 Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts (William Lawrence Roberts, P.S.C.), Pikeville, Kentucky, for claimant.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2006-BLA-06018) of Administrative Law Judge Daniel F. Solomon (the administrative law judge), on a subsequent claim[1] filed pursuant to the provisions of Title IV of the Federal Coal Mine

[1] Claimant's first claim for benefits was filed on September 13, 1988 and denied for failure to establish the existence of pneumoconiosis. The Board subsequently affirmed the denial of benefits on August 15, 1994. A second claim for benefits, filed on January 26, 2001, was denied for failure to establish pneumoconiosis, and the Board

Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge accepted the parties' stipulation that claimant engaged in qualifying coal mine employment for at least twenty-six years, as supported by the record, and determined that this claim was timely filed pursuant to 20 C.F.R. §725.308. The administrative law judge found that the newly submitted evidence of record was sufficient to establish total disability at 20 C.F.R. §718.204(b)(2), and thus demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering the entire record, the administrative law judge found that the weight of the evidence was sufficient to establish legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and total disability due to pneumoconiosis at 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's application of the amended regulations at Section 725.309, and contends that the administrative law judge erred in finding the existence of pneumoconiosis and disability causation established. Claimant has responded, urging affirmance of the award of benefits.[2] The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[3]

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.[4] 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).

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affirmed the denial of benefits on August 3, 2004. The current claim was filed on September 16, 2005.

[2] On February 22, 2008, claimant's counsel notified the Board of claimant's death on January 23, 2008, and enclosed a copy of the death certificate for the record.

[3] The administrative law judge's findings that this subsequent claim was timely filed pursuant to 20 C.F.R. §725.308, and that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] The law of the United States Court of Appeals for the Sixth Circuit applies because the miner was employed in coal mining in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202(1989)(*en banc*); Director's Exhibit 11.

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Where a miner 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 "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). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish the existence of pneumoconiosis at Section 718.202(a). Consequently, claimant had to submit new evidence establishing the existence of pneumoconiosis. 20 C.F.R. §725.309(d)(2), (3); *see Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

Initially, we reject employer's contention that the administrative law judge's analysis at Section 725.309(d) should have included consideration of the qualitative difference between the prior medical evidence and the newly submitted evidence, consistent with *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-228 (6th Cir. 2001) and *Ross*, 42 F.3d 993, 19 BLR 2-10. While employer concedes that the precedent of the United States Court of Appeals for the Sixth Circuit, upon which it relies, construes the prior version of Section 725.309, and that this subsequent claim was filed in 2005 after the effective date of the amendments to the regulations, employer contends that this claim should be controlled by the version of the regulation in place at the time the miner filed his first claim for benefits in 1988. Employer asserts that application of the revised regulations to this subsequent claim shifts the burden of proof and changes the substantive rules affecting employer's due process rights by allowing claimant to establish only a single element of entitlement previously adjudicated against him, rather than a material change in conditions. Employer thus contends that for the revised version of Section 725.309 to be valid, it should apply only to initial claims filed after January 19, 2001; otherwise, employer argues, any notion of finality or *res judicata* is compromised. Employer's Brief at 22-26. We disagree.

Claimant's current claim was filed on September 16, 2005, more than a year after the final decision in claimant's prior claim was rendered, and was properly adjudicated pursuant to the amended regulations, applicable to all claims filed after January 19, 2001. *See* 20 C.F.R. §725.2. Further, employer had proper notice of the amendments to Section 725.309, and similar arguments as to its validity and retroactive effect have been rejected by the courts. *See Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 23 BLR 2-124

(D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F. Supp.2d 47, ___BLR ___ (D.D.C. 2001). Thus, employer's contentions with regard to the proper application of the revised regulations at Section 725.309 are meritless. However, as the administrative law judge's finding of a change in an applicable condition of entitlement was based on his finding that the newly submitted evidence established total respiratory disability, an element of entitlement that was not reached in the denial of claimant's prior claim, we vacate his findings pursuant to Section 725.309(d) and his award of benefits. While the administrative law judge, upon review of the entire record, also indicated that claimant demonstrated a change in an applicable condition of entitlement by establishing the existence of legal pneumoconiosis, *see* Decision and Order at 16, his findings at Section 718.202(a)(4) cannot be affirmed, as set forth *infra*. Consequently, we remand this case for the administrative law judge to assess whether the weight of the newly submitted evidence is sufficient to establish the existence of pneumoconiosis and a change in an applicable condition of entitlement, prior to adjudicating the merits of entitlement based on the entire record, if reached.[5]

Next, employer challenges the administrative law judge's weighing of the evidence in finding that legal pneumoconiosis was established at Section 718.202(a)(4). In assessing the conflicting medical opinions of record, the administrative law judge first determined that the evidence from claimant's prior claims was not as probative as the new evidence, due to its age and the progressive nature of pneumoconiosis. Decision and Order at 12. After accurately summarizing the new medical opinions, the administrative law judge acknowledged the superior qualifications of employer's experts, Drs. Rosenberg and Jarboe, but found that Drs. Simpao, King and Hussain, the physicians relied upon by claimant, "have presented a 'reasoned' medical opinion that the Claimant had legal pneumoconiosis." Decision and Order at 13. Citing Dr. Simpao's examination findings and the recency of his pulmonary function study, which produced qualifying values and revealed both obstructive and restrictive components, the administrative law judge accorded greater weight to Dr. Simpao's opinion, that coal dust exposure was the primary cause of claimant's significant pulmonary impairment and that smoking was an aggravating factor. Decision and Order at 14. Without explanation, the administrative law judge stated that "I do not credit Dr. King's opinion with controlling weight, but I accept that he has treated the claimant for chronic obstructive pulmonary disease and pneumoconiosis. . . [and] that Dr. Hussain's opinions are consistent with Dr. King's opinion that Claimant has chronic obstructive pulmonary disease." Decision and Order at

[5] The administrative law judge's finding that the weight of the evidence of record was sufficient to establish total respiratory disability at 20 C.F.R. §718.204(b)(2), which is unchallenged on appeal, is subject to reinstatement by the administrative law judge, should he again find a change in an applicable condition of entitlement established at 20 C.F.R. §725.309(d).

13. While Dr. Rosenberg diagnosed disabling asthmatic bronchitis unrelated to coal dust exposure, and Dr. Jarboe diagnosed pulmonary emphysema and chronic asthmatic bronchitis with air trapping and airway spasms unrelated to coal dust exposure, the administrative law judge noted that all of the diagnosed conditions "may fall under the regulatory definition of pneumoconiosis if they are related to coal dust exposure." *Id.* Noting further that the record revealed multiple potential causes of claimant's respiratory impairment, that pneumoconiosis need not be the exclusive cause of impairment, and that employer's experts "rely almost entirely on the spirometry to render their opinions," when the Board has held that pulmonary function test results are not diagnostic of the presence or absence of pneumoconiosis, the administrative law judge gave less weight to the opinions of Drs. Jarboe and Rosenberg. Decision and Order at 13-14. The administrative law judge additionally found that employer's experts were too reliant on the reversibility of claimant's impairment, when reversibility and legal pneumoconiosis are not mutually exclusive; that Dr. Jarboe's logic was flawed; and that Dr. Simpao's testing, which took place nine months after Dr. Rosenberg's, revealed both a restrictive and an obstructive impairment, while Dr. Rosenberg's analysis was limited to the obstructive disorder. Decision and Order at 14-15. The administrative law judge thus concluded that the weight of the evidence of record established legal pneumoconiosis, as defined at 20 C.F.R. §718.201(a)(2). Decision and Order at 15.

Employer contends that, in finding legal pneumoconiosis established at Section 718.202(a)(4), the administrative law judge failed to provide adequate and valid reasons for according greater weight to the opinions of Drs. Simpao, King and Hussain, and less weight to the contrary opinions of Drs. Rosenberg and Jarboe. Employer maintains that the administrative law judge selectively analyzed the medical opinions, improperly substituted his own opinion for that of a medical professional, and failed to subject the opinions of claimant's physicians to the same scrutiny as those of employer's physicians. Employer's contentions have merit.

While the administrative law judge did not clearly indicate the weight to which the opinions of Drs. King and Hussain were entitled, he accorded less weight to the opinions of Drs. Rosenberg and Jarboe largely on the ground that spirometry results are not diagnostic of pneumoconiosis and these physicians relied heavily on the pattern of impairment shown on claimant's spirometry. However, the administrative law judge gave greater weight to Dr. Simpao's diagnosis of pneumoconiosis based, *inter alia*, upon physical examination findings and the obstructive and restrictive impairment shown on spirometry, even though the physician did not explain how the physical examination findings and test results supported his conclusions, or comment on whether the mixed impairment influenced his diagnosis, Claimant's Exhibit 1. *See Christian v. Monsanto Corp.*, 12 BLR 1-56 (1988).

Further, in finding that Dr. Jarboe's logic was flawed but that his deposition testimony, despite his contrary conclusions, "validates and substantiates Dr. Simpao's logic," the administrative law judge noted that "Dr. Jarboe testified that people who are impaired have a variation from day to day. . .[h]e diagnosed emphysema and admitted that emphysema can be caused by coal dust exposure. . . [h]e also diagnosed airway disease. . . [and] spastic airway that traps air. . . [t]hese are restrictive impairments." Decision and Order at 14. The administrative law judge speculated that "[a]lthough [Dr. Jarboe] was not asked, it is also reasonable to accept that air trapping and spastic airway can be caused by pneumoconiosis." *Id.* The administrative law judge also discounted Dr. Jarboe's explanation for the variability and pattern of impairment shown on claimant's spirometry on the ground that "spirometry should not be used to diagnose pneumoconiosis [and] there are 'legal' ailments that respond to bronchodilators," noting that "[a]lthough partial reversibility may be more consistent with findings of asthma or smoking-induced lung disease than pneumoconiosis, the recent pulmonary function studies, including those performed post-bronchodilator, still revealed both restrictive and obstructive aspects which are consistent with the opinions of Dr. Simpao." Decision and Order at 14. However, by concluding that the conditions diagnosed by Dr. Jarboe can be related to coal dust exposure, and by assuming that the presence of both restriction and obstruction demonstrates the existence of legal pneumoconiosis, the administrative law judge inappropriately substituted his own conclusions for those of a physician. Although the weighing of the evidence is for the administrative law judge, the interpretation of medical data is for the medical experts. *See generally Parulis v. Director, OWCP*, 15 BLR 1-28 (1991); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). Consequently, we vacate the administrative law judge's finding that legal pneumoconiosis was established at Section 718.202(a)(4), and remand this case for the administrative law judge to reassess the conflicting medical opinions in light of their support in the record and the quality, persuasiveness and detail of each physician's reasoning in determining whether claimant has met his burden thereunder. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

As the administrative law judge's weighing of the medical opinions on the issue of the existence of pneumoconiosis affected his credibility determinations on the issue of disability causation, we also vacate the administrative law judge's findings at Section 718.204(c), and remand the case for the administrative law judge to reevaluate the evidence thereunder, if reached.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge