BRB No. 06-0953 BLA

D.R.C. Claimant-Respondent v. ZEIGLER COAL COMPANY and INSURANCE COMPANY OF NORTH AMERICA Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/29/2007 DECISION and ORDER

Appeal of the Decision and Order-Granting Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Elizabeth Ashley Bruce and Ronald K. Bruce (Bruce Law Firm), Madisonville, Kentucky, for claimant.

Fred C. Statum, III and Philip L. Robertson (Manier & Herod), Nashville, Tennessee, for employer/carrier.

Jeffrey S. Goldberg (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier appeals the Decision and Order–Granting Benefits (04-BLA-6283) of Administrative Law Judge Joseph E. Kane rendered on a subsequent 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). Claimant filed an application for benefits on September 1, 1983, but later withdrew it. Director's Exhibit 1. Claimant next filed an application for benefits on March 2, 1987, which was denied on November 1, 1988, because claimant did not establish any element of entitlement. Director's Exhibit 2. Claimant took no further action on that claim.

On August 12, 2002, claimant filed the instant claim. The administrative law judge credited claimant with eleven years of coal mine employment[1] and found that the claim was timely filed. The administrative law judge found that the chest x-ray evidence developed since the prior denial of benefits established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and thus demonstrated a "material change in condition" pursuant to 20 C.F.R. §725.309.[2] The administrative law judge found that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge also determined that claimant established that he was totally disabled and that his disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2),(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in finding that the claim was timely filed. Further, employer contends that the administrative law judge erred in finding that the new x-ray evidence established the existence of pneumoconiosis. Employer also challenges the administrative law judge's findings that claimant's pneumoconiosis arose out of coal mine employment, that he is totally disabled, and that the total disability is due to pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs,

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[1] The record indicates that claimant's last coal mine employment took place in Kentucky. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[2] The former version of 20 C.F.R. §725.309(d) required that a miner establish a "material change in conditions." 20 C.F.R. §725.309(d)(2000). This subsequent claim filed on August 12, 2002, is governed by the amended regulation at 20 C.F.R. §725.309, under which claimant must establish a change in an applicable condition of entitlement since the prior denial of benefits. 20 C.F.R. §725.309(d).

responds, urging affirmance of the administrative law judge's finding that this claim was timely filed. Employer has filed a reply brief, further detailing its arguments.[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. 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).

Timeliness of the subsequent claim

Employer asserts that the administrative law judge erred in finding the instant claim to be timely filed. Specifically, employer maintains that claimant was diagnosed with coal workers' pneumoconiosis by three different physicians, more than three years before the filing of this claim.

The administrative law judge noted that each of the physicians whose opinions were submitted with claimant's 1987 claim diagnosed pneumoconiosis based solely on an x-ray. Consequently, the administrative law judge determined that the opinions of Drs. Powell, Anderson, and Simpao were not well-reasoned on the issue of pneumoconiosis. Director's Exhibit 2. Turning to the issue of disability, the administrative law judge noted that Drs. Powell and Anderson opined that claimant could return to his usual coal mine employment, and he found that Dr. Simpao's explanation for his disability assessment was illegible. Decision and Order at 5. Finding no well-reasoned medical opinion diagnosing claimant as totally disabled due to pneumoconiosis, the administrative law judge concluded that the evidence was insufficient to rebut the presumption that this claim was timely filed. Decision and Order at 4-5; *see* 20 C.F.R. §725.308.

Employer contends that "the issue should not be whether the diagnosis was well-reasoned, but simply that it was made." Employer's Brief at 5. This contention lacks merit. The three-year statute of limitations "relies on the 'trigger of the reasoned opinion of a medical professional.'" *Brigance v. Peabody Coal Co*. 23 BLR 1-170, 1-175 (2006)(*en banc*), quoting *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 607, 22 BLR 2-288, 2-297-98 (6th Cir. 2001). The administrative law judge permissibly found that the opinions of Drs. Powell, Anderson, and Simpao were not well-reasoned diagnoses of total disability due to pneumoconiosis. *See Kirk*, 264 F.3d at 607, 22 BLR

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant had eleven years of coal mine employment and that the blood gas study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

at 2-297-98. Thus, we affirm his finding that employer did not rebut the presumption of 20 C.F.R. §725.308(c) that this claim was timely filed.

Subsequent Claim

If a miner files an application 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); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). 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 pneumoconiosis, total disability, and disability causation. Consequently, claimant had to submit new evidence establishing one of these elements of entitlement to obtain consideration of the merits of the subsequent claim. 20 C.F.R. §725.309(d)(2),(3).

Employer challenges the administrative law judge's weighing of the new x-ray evidence, and asserts that the new evidence is "the same as [the] prior evidence," and thus fails to show a "material change in conditions." Employer's Brief at 6.

In evaluating the readings of three new x-rays, the administrative law judge considered the readings of each film, as well as the qualifications of the physicians providing the readings.[4] Based on this analysis, the administrative law judge found the October 31, 2002 film to be positive for pneumoconiosis, the July 13, 2004 film to be negative for pneumoconiosis, and the October 9, 2004 film to be positive for pneumoconiosis. He therefore found the preponderance of the new x-ray evidence to be positive for pneumoconiosis.

The administrative law judge based his finding on a qualitative analysis of the x-ray interpretations. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 60, 19 BLR 2-271, 2-281 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993). Therefore, employer's contention that the administrative law judge did not properly consider the physicians' respective qualifications lacks merit.

[4] The October 31, 2002 x-ray was read as positive for pneumoconiosis by Dr. Brandon, who is a B reader and Board-certified radiologist, and by Dr. Simpao, who lacks radiological qualifications. Director's Exhibit 14; Claimant's Exhibit 1. Dr. Park, whose qualifications are not in the record, read the same x-ray as showing clear lungs. Director's Exhibit 14. Dr. Repsher, who is a B reader, read the July 13, 2004 x-ray as negative for pneumoconiosis, Employer's Exhibit 1, and Dr. Baker, who is also a B reader, read the October 9, 2004 x-ray as positive for pneumoconiosis. Claimant's Exhibit 2.

Employer additionally contends that the administrative law judge should not have relied on Dr. Baker's positive x-ray reading, because the administrative law judge accorded less weight to Dr. Baker's medical opinion diagnosing clinical pneumoconiosis pursuant to Section 718.202(a)(4). Employer's contention lacks merit.

In this case, arising within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, the existence of pneumoconiosis may be established based solely on x-ray evidence. *See Furgerson v. Jericol Mining, Inc.*, 22 BLR 1-216, 1-226 (2002)(*en banc*). Further, there is no requirement that the weight accorded to a physician's opinion at Section 718.202(a)(4) be considered by the administrative law judge in weighing that physician's x-ray interpretation pursuant to Section 718.202(a)(1). *See* 20 C.F.R. §718.202(a)(1). We therefore reject employer's argument and affirm the determination that the new x-ray evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(1), and a change in an applicable condition of entitlement pursuant to Section 725.309(d).[5]

The existence of pneumoconiosis

After finding that the new evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(1), the administrative law judge stated:

> As the medical evidence in Claimant's previous claim is over ten years old, I grant greater weight to the newly submitted evidence. Accordingly, I continue to rely on the newly submitted evidence to find that Claimant has established pneumoconiosis.

Decision and Order at 12; *see Orange v. Island Creek Coal Co.*, 786 F.2d 724, 8 BLR 2-192 (6th Cir. 1986); *Coffey v. Director, OWCP*, 5 BLR 1-404 (1982). Employer does not challenge this finding. It is therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Consequently, we decline to address employer's assertions regarding the administrative law judge's weighing of the medical opinions pursuant to Section 718.202(a)(4).[6] *See Furgerson*, 22 BLR at 1-226.

[5] Revised 20 C.F.R. §725.309 does not require that an administrative law judge conduct a qualitative comparison between the new evidence and the previously submitted evidence. Accordingly, there is no merit to employer's contention that the administrative law judge had to determine whether the new evidence differed qualitatively from the prior evidence. Employer's Brief at 6.

[6] At Section 718.202(a)(4), the administrative law judge found that claimant did not establish the existence of legal pneumoconiosis, but did establish the existence of clinical pneumoconiosis. Decision and Order at 13-14.

Cause of claimant's pneumoconiosis

In finding that claimant's pneumoconiosis arose out of his coal mine employment, the administrative law judge correctly determined that, with eleven years of coal mine employment, claimant benefited from the rebuttable presumption that his pneumoconiosis arose out of his coal mine employment. *See* 20 C.F.R. §718.203(b). Therefore, contrary to employer's assertion, claimant was not required to produce affirmative evidence that his clinical pneumoconiosis established by x-ray arose out of coal mine employment.

The administrative law judge found that, "since there is no evidence in the record to rebut this presumption . . . Claimant has proven that his pneumoconiosis arose out of his employment in the coal mines. . . ." Decision and Order at 14. Employer maintains that the opinions of Drs. Repsher and Tuteur rebut the causation presumption contained in Section 718.203(b). The record reflects that Drs. Tuteur and Repsher based their opinions, that claimant does not have clinical pneumoconiosis, on negative x-rays. Therefore, they were not in a position to offer an opinion on the etiology of the clinical pneumoconiosis the administrative law judge found established by chest x-ray. Therefore, we affirm the administrative law judge's finding that the presumption that claimant's pneumoconiosis arose out of his coal mine employment pursuant to Section 718.203(b) was not rebutted.

Total disability

Employer asserts that the administrative law judge erred in relying on the medical opinions of Drs. Baker and Simpao, that claimant is totally disabled by a moderate pulmonary impairment, to find that claimant established total disability pursuant to Section 718.204(b)(2)(iv). Employer maintains that neither doctor's opinion was supported by objective evidence and that neither doctor indicated that he was familiar with the exertional requirements of claimant's usual coal mine employment. Employer's Brief at 14.[7]

[7] The new evidence includes several opinions addressing claimant's disability. Dr. Simpao noted that claimant was a "general inside laborer," and he opined that claimant has a moderate impairment and does not have the respiratory capacity to do the work of a miner in a dust free environment. Director's Exhibit 4. Dr. Baker noted that in claimant's last coal mine employment, he shot coal, was a shuttle car operator and performed inside labor. Dr. Baker opined that claimant has a moderate impairment, and he stated that claimant has a:

> class 3 pulmonary impairment, with the FEV1 between 40 and 59% of predicted. This would be a 25-50% impairment of the whole person based

Employer's assertions lack merit. The administrative law judge found that Drs. Baker and Simpao rendered well-reasoned and well-documented opinions that were based on objective testing, and substantial evidence supports the administrative law judge's permissible determination. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Director's Exhibit 14; Claimant's Exhibit 2. Further, contrary to employer's contention, the record indicates that both doctors were familiar with the nature of claimant's usual coal mine work. Drs. Baker and Simpao both recognized that claimant worked underground as a general inside laborer, which required him to shoot coal, operate a shuttle car, and work as a loader helper. Director's Exhibit 14 (medical report at 1, 7); Claimant's Exhibit 2 at 1. Therefore, it was rational for the administrative law judge to conclude that Drs. Baker and Simpao understood the demands of claimant's usual coal mine work when they opined that he was totally disabled for his coal mine work by a moderate impairment. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713, 22 BLR 2-537, 2-552-53 (6th Cir. 2002)(holding that a physician who finds total disability need not convey precise knowledge of the exertional demands of miner's job).

Moreover, the administrative law judge's finding, which is not challenged by employer, was that claimant worked "for the majority of his career as a coal miner shooting coal," which required him to perform "heavy manual labor, including lifting up to ninety pounds."[8] Decision and Order at 2. Consequently, the administrative law judge could rationally conclude from the opinions of Drs. Baker and Simpao that claimant was disabled from performing his job by a moderate impairment. *See Napier*, 301 F.3d at 713, 22 BLR at 2-552-53. We therefore reject employer's contentions, and affirm the administrative law judge's finding pursuant to Section 718.204(b)(2)(iv).

Employer does not challenge the administrative law judge's additional finding that, upon consideration of all the relevant evidence, claimant established total disability

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> on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition. . . . He does not have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment.

Claimant's Exhibit 2. Dr. Repsher diagnosed "mild to moderate COPD," and Dr. Tuteur did not describe the degree of any respiratory or pulmonary impairment. Employer's Exhibits 1-4.

[8] At the hearing and in documentary evidence submitted with his benefits claim form, claimant described having to repeatedly lift and carry ninety-pound "shells" used for shooting coal. Hearing Tr. at 15-16; Director's Exhibit 6.

pursuant to Section 718.204(b)(2). The finding is therefore affirmed. *Skrack*, 6 BLR at 1-711.

Total Disability Due to Pneumoconiosis

Pursuant to Section 718.204(c), the administrative law judge found that Dr. Simpao's opinion attributing claimant's total disability to pneumoconiosis was the only well-reasoned and well-documented opinion, and he determined that it established that claimant is totally disabled due to clinical pneumoconiosis.[9] Employer contends that the administrative law judge erred because he did not resolve the conflicting evidence concerning the extent of claimant's smoking history. This contention has merit.

The administrative law judge relied on claimant's testimony and his statements to physicians to find that claimant had a thirty-six pack year smoking history, starting in 1967 and quitting in 2003, and that claimant continues to smoke only a few cigarettes daily. However, as employer notes, when Dr. Repsher examined and tested claimant on July 13, 2004, he detected levels of carboxyhemoglobin, serum nicotine, and cotinine, that "suggest[ed] a current 2 ½ to 3 pack per day cigarette smoking habit."[10] Employer's Exhibit 1 at 3. Although the administrative law judge noted Dr. Repsher's test results, he did not indicate the weight he accorded the results or how he reconciled them with

[9] Drs. Repsher and Tuteur concluded that claimant's respiratory impairments are due to smoking and diseases unrelated to coal mine employment. The administrative law judge discounted their opinions because the doctors did not diagnose pneumoconiosis, inconsistent with the administrative law judge's finding. We have not affirmed that determination, however, because the administrative law judge did not address that Drs. Repsher and Tuteur concluded that claimant does not have legal pneumoconiosis, consistent with the administrative law judge's finding.

[10] Dr. Repsher diagnosed "Cigarette addiction, extremely severe." Employer's Exhibit 1 at 3.

claimant's testimony and statements when he determined the extent of claimant's smoking history. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988)(holding that the administrative law judge is charged with resolving conflicts in the evidence). Since the extent of claimant's smoking history may bear on the probative value of the medical opinions as to the cause of claimant's total disability, *see Sellards v. Director, OWCP*, 17 BLR 1-77, 1-81 (1993), we vacate the administrative law judge's finding and remand the case for him to reconsider claimant's smoking history. On remand, the administrative law judge must consider whether pneumoconiosis is a substantially contributing cause of claimant's total disability. 20 C.F.R. §718.204(c)(1).

Accordingly, the administrative law judge's Decision and Order-Granting Benefits is affirmed in part, vacated in part, and the case is remanded to the administrative law judge for further proceedings 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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REGINA C. McGRANERY
Administrative Appeals Judge