BRB No. 99-0336 BLA

SAMUEL M. MOON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Ben Core (Daily & Woods, PLLC), Fort Smith, Arkansas, for claimant.

Sylvia D. Davis (Arter & Hadden LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-0890) of Administrative Law Judge Jeffrey Tureck denying 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 administrative law judge, based on the parties' stipulation, credited claimant with twenty-two years of coal mine

employment and adjudicated this duplicate claim[1] pursuant to the regulations contained in 20 C.F.R. Part 718. Although the administrative law judge found the newly submitted evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c), he also found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Consequently, the administrative law judge concluded that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

[1]Claimant filed his first claim on July 13, 1982. Director's Exhibit 36. This claim was denied by a Department of Labor (DOL) claims examiner on October 25, 1982 because claimant failed to establish the existence of pneumoconiosis and total disability. *Id*. Inasmuch as claimant did not pursue this claim any further, the denial became final. On August 11, 1987, Claimant filed his second claim, which was denied by a DOL claims examiner on January 13, 1988 because claimant failed to establish the existence of pneumoconiosis and total disability. Director's Exhibit 37. On March 7, 1988, claimant filed a request for additional time to respond to the denial of benefits, which a DOL claims examiner granted on March 9, 1988. *Id*. However, because claimant did not pursue this claim any further, the denial became final. Claimant filed his most recent claim on September 22, 1994. Director's Exhibit 1.

On appeal, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4). Employer responds, urging affirmance of the administrative law judge's Decision and Order.[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. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After considering the newly submitted evidence, the administrative law judge found that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309. Claimant's previous claim was denied because claimant failed to establish the existence of pneumoconiosis and total disability. Director's Exhibit 37. The United States Court of Appeals for the Tenth Circuit, within whose jurisdiction this case arises, held that in order to bring a duplicate claim, 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. *Wyoming Fuel Co. v. Director, OWCP* [*Brandolino*], 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996). The court explained that in order to meet the claimant's threshold burden of proving a material change in a particular element, the claimant

[2]Claimant filed a brief in reply to employer's response brief, which reiterates his prior contentions.

[3]Inasmuch as the administrative law judge's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §§718.202(a)(2), (a)(3), and 718.204(c) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

need not go as far as proving that he or she now satisfies the element; rather, the claimant need show only that this element has worsened materially since the time of the prior denial. *Id*.

Initially, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). The newly submitted x-ray evidence of record consists of fifty-one interpretations of nine x-rays. The administrative law judge stated that "[o]nly five of these readings were positive under the ILO/UC system required by the regulations for interpreting x-rays for pneumoconiosis: a July 18, 1994 x-ray by Dr. Shipley (EX 1); a November 17, 1994 x-ray by Drs. Lee (DX 16) and Sider (DX 29); and a September 9, 1996 x-ray by Drs. Shipley (EX 1) and Repsher (EX 12)." Decision and Order at 3-4. The administrative law judge also stated that "Drs. Shipley and Repsher both stated that their findings are not consistent with a diagnosis of coal workers' pneumoconiosis (*see* EX 1; DX 28, at 38-39); and Dr. Lee apparently interpreted his findings as indicative of interstitial fibrosis rather than coal workers' pneumoconiosis." *Id*. at 4. Hence, the administrative law judge found that "four of the five positive readings are at best equivocal, and the remaining 45 or so readings are negative." Decision and Order at 4.

Claimant asserts that the administrative law judge erred by applying the later evidence rule to exclude three earlier positive x-ray readings. Contrary to claimant's assertion, the administrative law judge did not apply the later evidence rule in weighing the conflicting newly submitted x-ray evidence. *See generally 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); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Pate v. Alabama By-Products Corp.*, 6 BLR 1-636 (1983). Rather, in analyzing the ILO classifications and the comments provided by Drs. Shipley and Repsher with respect to the July 18, 1994 and September 9, 1996 x-rays, the administrative law judge merely stated that "both Drs. Shipley and Repsher read a subsequent x-ray as completely negative for pneumoconiosis (DX 50; EX 26)." Decision and Order at 4. Thus, we reject claimant's assertion that the administrative law judge erred by applying the later evidence rule to exclude three earlier positive x-ray readings. Moreover, while the administrative law judge erred in considering the comments of the physicians in his weighing of the conflicting newly submitted x-ray evidence, *see Cranor v. Peabody Coal Co.*, BRB No. 97-1668 BLA, BLR (Oct. 29, 1999)(to be published), the administrative law judge's error in this regard is harmless in view of

the overwhelming negative readings of the newly submitted x-rays,[4] *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Thus, we hold that substantial evidence supports the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). *See Director, OWCP v. Greenwich Collieries [Ondecko],* 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Next, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). We disagree. Whereas Drs. Bregman and Sutton opined that claimant suffers from black lung disease, Director's Exhibits 46, 47A, Drs. Fielding, Renn, Repsher and Tuteur opined that claimant does not suffer from coal workers' pneumoconiosis, Director's Exhibits 31, 47, 49; Employer's Exhibits 23, 25, 28, 29. Dr. Christensen, in a report dated February 1994, diagnosed pulmonary fibrosis and chronic obstructive lung disease related to "probable environmental exposure to dust." Director's Exhibit 14. In a subsequent report dated January 29, 1997, Dr. Christensen opined that "[t]he fibrotic pattern and the emphysematous changes certainly are findings which can be found in Black Lung Disease." Claimant's Exhibit 1.

[4]The record indicates that forty-six of the fifty-one newly submitted x-ray readings of record are negative for pneumoconiosis. Director's Exhibits 16, 17, 27, 29, 31, 39, 40, 47, 47A, 49; Claimant's Exhibit 2; Employer's Exhibits 1-3, 8-12, 15-20, 26, 27.

The administrative law judge properly accorded greater weight to the opinion of Dr. Tuteur than to the contrary opinions of Drs. Bregman and Sutton because he found Dr. Tuteur's opinion to be better reasoned,[5] *see Clark, supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984), and because he found Dr. Tuteur's opinion to be supported by Dr. Renn's opinion,[6] *see Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984). Further, the administrative law judge properly accorded greater weight to the opinion of Dr. Tuteur than to the contrary opinions of Drs. Bregman and Sutton because of Dr. Tuteur's superior qualifications.[7] *See Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). In addition, the administrative law judge permissibly

---

[5]The administrative law judge observed that "Dr. Tuteur's opinion that claimant's pulmonary impairment is not related to his coal mine employment is very well explained, and does not rest on his suspicion that claimant's smoking history is understated." Decision and Order at 6. In contrast, the administrative law judge observed that Dr. Sutton does not "explain why he diagnoses black lung, and without an explanation his diagnosis is not credible despite the fact that he is claimant's regular treating physician." *Id*. at 4. The administrative law judge also observed that Dr. Bregman "stated that '[h]e has a very insignificant smoking history, thus, it seems that his disease process is Black Lung Disease.'" *Id*. The administrative law judge stated, "Assuming there were only two possible causes of a severe obstructive impairment – smoking and coal mining – then Dr. Bregman's diagnosis might be reasonable...[b]ut there are innumerable respiratory and pulmonary conditions which are capable of producing severe obstructive impairment; and concluding that the cause of claimant's impairment must be coal mining because it is not smoking is nonsensical, particularly in light of Dr. Bregman's observation that claimant's 'chest x-ray revealed changes only consistent with COPD [chronic obstructive pulmonary disease].'" *Id*.

[6]The administrative law judge stated that Dr. Renn's opinion "provides strong support for Dr. Tuteur's conclusions." Decision and Order at 7.

[7]The administrative law judge observed that Dr. Tuteur "is a highly qualified pulmonary specialist." Decision and Order at 6. Dr. Tuteur is Board-certified in internal medicine and pulmonary disease. Director's Exhibit 47. Dr. Renn is Board-certified in internal medicine and the subspecialty of pulmonary disease. Director's Exhibit 47. The record does not contain the credentials of Drs. Bregman and Sutton.

discredited the opinion of Dr. Christensen because he found it to be equivocal.[8] *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

The administrative law judge also discredited the opinions of Drs. Christensen and Repsher because he found that the doctors based their opinions on inaccurate smoking histories. In his decision, the administrative law judge observed that "despite telling several doctors that he never smoked (*see, e.g.*, DX 14), claimant was a cigarette smoker for at least some period of time." *Id*. at 2. The administrative law judge stated that claimant "testified that he started smoking while he was in the Army." *Id*. The administrative law judge also stated that "since his wife testified credibly that she never saw him smoke (TR 77), he must have stopped completely by 1952." *Id*. Although the administrative law judge found that claimant smoked cigarettes, the administrative law judge did not render a specific determination with regard to the amount of cigarettes claimant smoked and the length of time claimant smoked to compare with the smoking histories relied upon by the physicians. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988). Nonetheless, inasmuch as Dr. Respher opined that claimant does not suffer from coal workers' pneumoconiosis, and inasmuch as the administrative law judge provided a valid alternate basis for discrediting Dr. Christensen's opinion, *see Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Kozele v. Rochester and*

[8]The administrative law judge stated that Dr. Christensen's opinion "is much too equivocal to be found to be a diagnosis of coal workers' pneumoconiosis." Decision and Order at 5. As previously noted, Dr. Christensen, in a report dated February 1994, diagnosed pulmonary fibrosis and chronic obstructive lung disease related to "**probable** environmental exposure to dust." Director's Exhibit 14 (emphasis added). Further, in a subsequent report dated January 29, 1997, Dr. Christensen opined that "[t]he fibrotic pattern and the emphysematous changes certainly are findings which **can be** found in Black Lung Disease." Claimant's Exhibit 1 (emphasis added).

Pittsburgh Coal Co., 6 BLR 1-378 (1983), in that he found Dr. Christensen's opinion to be equivocal, *see Justice, supra*; *Campbell, supra*, the administrative law judge's error in this regard is harmless, *see Larioni, supra*.

Claimant asserts that any doubt raised by the conflicting medical evidence of record should have been resolved in his favor. The United States Supreme Court held that application of the "true doubt" rule violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). *See Ondecko, supra*. Consequently, inasmuch as claimant must demonstrate the existence of pneumoconiosis by a preponderance of the evidence, claimant's attempt to invoke the "true doubt" rule in weighing the conflicting medical evidence is unavailing. *See Ondecko, supra*.

Further, claimant asserts that the administrative law judge should have accorded determinative weight to Dr. Sutton's opinion because he is claimant's treating physician. While an administrative law judge may accord greater weight to the medical opinion of a treating physician, *see Onderko v. Director, OWCP*, 14 BLR 1-2 (1989), he is not required to do so, *see Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Amax Coal Co. v. Franklin,* 957 F.2d 355, 16 BLR 2-50 (7th Cir. 1992); *cf. Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *see also Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Burns v. Director, OWCP*, 7 BLR 1-597 (1984). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Finally, we reject claimant's assertion of bias by Drs. Renn, Repsher and Tuteur because there is no evidence in the record to support this assertion. *See generally Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989). Therefore, we hold that substantial evidence supports the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Since the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), we hold that substantial evidence supports the administrative law judge's finding that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309. *See Brandolino, supra*. Therefore, we affirm the administrative law judge's denial of benefits.

Accordingly, the administrative law judge's Decision and Order denying 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