BRB No. 02-0646 BLA

CLARENCE E. BROWN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DOMINION COAL CORPORATION	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Clarence E. Brown, Raven, Virginia, *pro se*.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order on Remand - Denying Benefits (99-BLA-1180) of Administrative Law Judge Joseph E. Kane

(the administrative law judge) on a duplicate claim[1] 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).[2] This case is before the Board for the second time. The administrative law

[1]Claimant filed a claim on July 13, 1992, which was denied by the district director on March 4, 1993. Director's Exhibit 29. The record contains no evidence that claimant pursued the claim. Claimant filed a second claim on May 25, 1994. Director's Exhibit 30. By Decision and Order dated June 28, 1996, Administrative Law Judge Jeffrey Tureck found that the evidence was insufficient to establish that claimant has complicated pneumoconiosis and, therefore, failed to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis under 20 C.F.R. §718.304 (2000). Judge Tureck also found that the newly submitted evidence otherwise failed to establish total disability due to pneumoconiosis. *Id.* Accordingly, benefits were denied. Claimant appealed. By Order dated April 15, 1997, the Board dismissed as abandoned claimant's appeal in *Brown v. Dominion Coal Corp.*, BRB No. 96-1427 BLA. *Brown v. Dominion Coal Corp.*, BRB No. 96-1427 BLA (Apr. 15, 1997)(Order)(unpublished). Claimant filed the instant claim on October 15, 1998. Director's Exhibit 1.

[2]The Department of Labor has amended the regulations implementing the Federal

judge, in his original Decision and Order, found that the newly submitted evidence was insufficient to establish total disability under 20 C.F.R. §718.204(c) (2000)[3] or to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis under 20 C.F.R. §718.304 (2000). The administrative law judge thus found that the newly submitted evidence did not establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Accordingly, benefits were denied.

The Board considered claimant's appeal in *Brown v. Dominion Coal Corp.*, BRB No. 00-0174 BLA (Aug. 29, 2001)(unpub.). The Board affirmed the administrative law judge's finding that the newly submitted evidence did not establish total disability under 20 C.F.R. §718.204(c) (2000) or a material change in conditions under 20 C.F.R. §725.309 (2000) on that basis. The Board noted, however, that the record contained newly submitted evidence supportive of a finding of complicated pneumoconiosis. The Board noted that this evidence, if credited, could establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis under 20 C.F.R. §718.304 (2000) and, therefore, could support a finding of a material change in conditions at 20 C.F.R. §725.309 (2000). The Board held that the administrative law judge erroneously focused on Judge Tureck's finding, in denying the prior claim, that the relevant evidence was insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis provided at 20 C.F.R. §718.304 (2000). The Board held that the administrative law judge, in considering whether the newly submitted evidence is sufficient to establish a material change in conditions under 20 C.F.R. §725.309 (2000), should have independently determined whether the newly submitted evidence was sufficient to establish that claimant has complicated pneumoconiosis. Consequently, the Board vacated the administrative law judge's finding that claimant failed

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Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

to establish a material change in conditions under 20 C.F.R. §725.309 (2000) and remanded the case. The Board instructed the administrative law judge to determine whether the newly submitted evidence is sufficient to establish invocation of the irrebuttable presumption at 20 C.F.R. §718.304 (2000), thereby establishing a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). The Board further instructed the administrative law judge to consider the instant claim on its merits if he were to find a material change in claimant's condition.

On remand, the administrative law judge concluded that the newly submitted evidence does not establish that claimant has complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 (2000) and thus, does not meet claimant's burden to establish a material change in conditions under 20 C.F.R. §725.309 (2000). The administrative law judge specifically found that the newly submitted x-ray readings and medical opinions "stand in equipoise" regarding whether or not claimant has complicated pneumoconiosis.

On appeal, claimant urges the Board to reverse the decision below or, alternatively, to remand the case to another administrative law judge, given this administrative law judge's "apparent inflexibility." Claimant's *Pro Se* Statement at 18. Employer responds, and urges affirmance of the decision below.[4] The Director, Office of Workers' Compensation Programs, has not filed a brief in the appeal.

[4]Employer submits that this duplicate claim is untimely filed under 20 C.F.R. §725.308. Employer concedes that this issue is not before the Board and seeks only to preserve it for appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP,* 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 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).[5]

Claimant argues that the x-ray interpretations of Drs. Wheeler and Scott cannot be given probative weight "in that they did not state whether their opinions included review of the repeated 'negative-for-TB' skin tests and/or the results of the prior bronchoscopy and transbronchial biopsy." Claimant's *Pro Se* Statement at 10. We disagree. As an initial matter, the administrative law properly considered both the quantitative and qualitative nature of the newly submitted x-ray evidence in finding that "the x-ray evidence, standing alone, is, at best, in equipoise concerning the presence or absence of complicated pneumoconiosis." Decision and Order on Remand at 15; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). The administrative law judge also properly accorded greater weight to the x-ray readings rendered by physicians who are dually qualified as B readers and Board-certified radiologists. *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999)(*en banc* on recon.); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984). The administrative law judge permissibly assigned probative weight to the x-ray readings of Drs. Wheeler and Scott because these physicians are dually qualified and because they each read numerous x-rays and thereby had the opportunity to observe the progression, or lack thereof, of claimant's lung mass. *Cranor, supra*; *Sheckler, supra; see also Hall v. Director, OWCP*, 8 BLR 1-193 (1985). Further, Dr. Wheeler was asked on deposition whether the fact that claimant tested negative on a "PPD" tuberculin test would change his opinion that the lesion seen on x-ray was *healed* tuberculosis. Dr. Wheeler answered that it would not, because this tuberculin test is useful in detecting active tuberculosis and becomes "progressively less useful as the person gets older without active tuberculosis, because the immune response can be forgotten literally by the immune system." *See* Employer's Exhibit 9 at 8-11. Dr. Scott did not render a narrative medical report, but read several x-ray films in connection with the instant claim, *see* Employer's Exhibits 3, 4, 6. Therefore, we do not address further claimant's argument that the x-ray interpretations of Dr. Scott cannot be given probative

[5]Inasmuch as claimant has filed a *Pro Se* Statement in which he presents several arguments in support of the appeal, we will additionally specifically address the arguments raised by claimant.

weight because Dr. Scott did not state whether his opinion included review of the results of claimant's tuberculin tests, bronchoscopy, and transbronchial biopsy. Because substantial evidence supports the administrative law judge's finding that the newly submitted evidence fails to establish that claimant has complicated pneumoconiosis and thus fails to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis under 20 C.F.R. §718.304 or a material change in conditions under 20 C.F.R. §725.309 (2000), we affirm that finding.

We next address the administrative law judge's finding that the newly submitted medical opinions fail to demonstrate that claimant has complicated pneumoconiosis because they, like the newly submitted x-ray interpretations, are in equipoise concerning the presence of complicated pneumoconiosis. Claimant contends that the weight of the newly submitted medical opinions establishes that he has complicated pneumoconiosis. Claimant argues that the opinions of Drs. Wheeler and Branscomb, that claimant's lung lesion is healed tuberculosis, must be given little, if any, weight because they are vague, equivocal, not based on any evidence of record, and because these physicians did not address all etiological factors. Claimant also asserts that Dr. Branscomb's finding that claimant does not have pneumoconiosis renders his opinion hostile to the Act because the record conclusively establishes that claimant has pneumoconiosis. Claimant acknowledges that Dr. Branscomb assumed the presence of simple pneumoconiosis based on the medical opinions of other physicians of record, but asserts that Dr. Branscomb should have assumed the presence of complicated pneumoconiosis in rendering his opinion. Claimant also argues that the administrative law judge erred in discrediting the medical opinion of Dr. Smiddy, claimant's treating physician.

We disagree. The administrative law judge permissibly credited the opinions of Drs. Robinette and Alexander that claimant has complicated pneumoconiosis and the opinions of Drs. Wheeler and Branscomb that claimant does not have complicated pneumoconiosis, permissibly discredited Dr. Smiddy's opinion that claimant has complicated pneumoconiosis, and further properly found that the opinions of Drs. Castle, Michos and Iosif were inconclusive and did not weigh for or against a finding that claimant has complicated pneumoconiosis. *See generally Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Doss v. Director, OWCP*, 53 F.3d 654, 19 BLR 2-181 (4th Cir. 1995). Further, substantial evidence in the record supports the administrative law judge's finding that the medical opinions of Drs. Wheeler and Branscomb are credible as they are reasoned and documented. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Moreover, the record shows that Drs. Wheeler and Branscomb did consider other etiological factors in rendering their respective opinions that claimant's lung mass is healed tuberculosis, *see* Employer's Exhibits 7, 9, and the fact that Dr. Branscomb did not assume that claimant has complicated pneumoconiosis does not render his opinion unreasoned.

We next address the administrative law judge's weighing of the opinion rendered by Dr. Smiddy, claimant's treating physician. The administrative law judge found that Dr. Smiddy's final narrative opinion dated March 9, 1999 was not well-reasoned because Dr. Smiddy "fails to reconcile his final diagnosis of complicated pneumoconiosis with his previous x-ray interpretations that merely diagnosed simple bilateral pneumoconiosis, which were proceeded [sic] by interpretations of the doctor's that diagnosed complicated pneumoconiosis." Decision and Order on Remand at 16. Claimant argues that there is no discrepancy between Dr. Smiddy's report and its underlying x-ray evidence. Claimant acknowledges that while Dr. Smiddy may have omitted the word "complicated" from his interpretation of claimant's x-rays on a few occasions, Dr. Smiddy's March 9, 1999 final narrative opinion shows that "there never was a question in Dr. Smiddy's mind whether or not the Claimant had complicated coal workers' pneumoconiosis." Claimant's *Pro Se* Statement at 15. Substantial evidence in the record supports the administrative law judge's discrediting of Dr. Smiddy's report. Dr. Smiddy, in his March 9, 1999 medical report, stated:

> We have compared all of your x-rays from 11-2-1993 through 03-09-1999. Your x-rays show bilateral upper lobe densities greater on the right consistent with progressive massive fibrosis secondary to complicated pneumoconiosis. We believe that you are disabled by your complicated pneumoconiosis.

Claimant's Exhibit 9. The record also shows that Dr. Smiddy interpreted an April 30, 1996 x-ray as positive for "severe complicated bilateral pneumoconiosis," Director's Exhibit 24; a January 7, 1997 x-ray as positive for "severe complicated bilateral pneumoconiosis," *Id.*; a September 8, 1997 x-ray as positive for "extensive old changes of bilateral pneumoconiosis," *Id.*, a March 10, 1998 x-ray as positive for "extensive changes of bilateral pneumoconiosis," *Id.*; Claimant's Exhibit 5, and a September 10, 1998 x-ray as positive for "extensive changes of bilateral pneumoconiosis, stable," Director's Exhibits 13, 24; Claimant's Exhibit 6. On this record, we hold that the administrative law judge reasonably found that Dr. Smiddy's medical opinion contains an inconsistency which he did not reconcile and is, consequently, not well-reasoned. *See Hopton v. United States Steel Corp.*, 7 BLR 1-12 (1984). Further, the administrative law judge permissibly declined to accord Dr. Smiddy's opinion greater weight based on his status as claimant's treating physician. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993).

Claimant argues that the opinions of Drs. Smiddy, Robinette, Iosif and Castle should have been given more weight because they were based, in part, on a physical examination of claimant. Claimant acknowledges that the opinions of Drs. Castle and Iosif are equivocal on the issue of whether claimant has complicated pneumoconiosis, but argues that when one

realizes that Drs. Castle and Iosif "had access to the negative for TB and lung cancer tests, etc., then on second glance, their opinions would be more emphatic that the Claimant suffers from complicated pneumoconiosis." Claimant's Pro Se Statement at 12. We disagree. The administrative law judge was not obligated to accord greater weight to the opinions of those physicians who performed a physical examination of claimant. *See Hicks, supra; Akers, supra*. In the instant case, the administrative law judge properly found that the opinions of Drs. Iosif and Castle, as well as Dr. Michos, did not weigh for or against a finding that claimant has complicated pneumoconiosis inasmuch as these physicians indicated that there were not able to definitively rule in or out the presence of complicated pneumoconiosis. Decision and Order on Remand at 16; Director's Exhibit 9; Employer's Exhibit 8. Moreover, the administrative law judge did credit Dr. Robinette's opinion that claimant has complicated pneumoconiosis and provided a valid basis for discrediting Dr. Smiddy's opinion that claimant has complicated pneumoconiosis. *See* discussion, *supra*.

Based on the foregoing, we affirm the administrative law judge's finding that the x-ray and medical opinion evidence fails to establish that claimant has complicated pneumoconiosis and, thus, is insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis under 20 C.F.R. §718.304.

Claimant argues that he has established a material change in conditions, and asserts that the newly submitted evidence shows both a greater profusion of small opacities in his lung and that his lung's large opacities have expanded from Category A to Category B. The administrative law judge reviewed all of the newly submitted evidence and found that it is insufficient to meet claimant's burden to demonstrate a material change in conditions under 20 C.F.R. §725.309 (2000) since the prior denial. We affirm the administrative law judge's finding under 20 C.F.R. §725.309 (2000) as it is rational, supported by substantial evidence, and in accordance with law. As set forth above, the administrative law judge properly weighed the newly submitted evidence and determined that it is insufficient to establish that claimant has complicated pneumoconiosis or that there has been a material change in claimant's condition since the prior denial. 20 C.F.R. §725.309 (2000). *See Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). Substantial evidence in the record supports the administrative law judge's specific finding that claimant failed to establish, by a preponderance of the newly submitted evidence, that there has been a material change in conditions under 20 C.F.R. §725.309 (2000). *Id.*

Accordingly, the administrative law judge's Decision and Order on Remand - Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge