BRB No. 06-0177 BLA

JOHNNIE LEEDY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SUPERIOR MINING & MINERALS	)	DATE ISSUED: 11/29/2006
	)	
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 Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center, Inc.), Prestonsburg, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Helen H. Cox (Howard M. Radzely, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2004-BLA-5846) of Administrative Law Judge Linda S. Chapman 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). The administrative law judge credited the

miner with at least thirty-five years of qualifying coal mine employment, and adjudicated this claim, filed on September 9, 2002, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge determined that the miner's previous claim had been finally denied on September 6, 1994, for failure to establish any element of entitlement, and that the present claim was timely filed and subject to the provisions at 20 C.F.R. §725.309(d). The administrative law judge found that new evidence submitted in support of this subsequent claim established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and thus established that one of the applicable conditions of entitlement had changed pursuant to 20 C.F.R §725.309(d) since the prior denial. The administrative law judge then found that the weight of the evidence of record established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in her analysis at 20 C.F.R. §725.309(d) and her weighing of the evidence at 20 C.F.R. §§718.202(a)(4), 718.204(b), (c). Claimant responds, urging affirmance.[1] The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing that the administrative law judge applied the correct standard for finding a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), and that she properly concluded that the weight of the evidence supports a finding of total respiratory disability at 20 C.F.R. §718.204(b).

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).

Employer initially contends that the administrative law judge erred in finding that claimant demonstrated a change in an applicable condition of entitlement pursuant to Section 725.309(d) based on her finding that new evidence submitted in support of this subsequent claim established the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Employer challenges the administrative law judge's weighing of the evidence, and asserts that because this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, the administrative law judge's analysis pursuant to Section 725.309(d) must include consideration of the qualitative difference

[1] Although the administrative law judge did not reform the caption of this case, she acknowledged that the miner died on July 5, 2004, and that the claimant herein was Emaglea Leedy, who was named as the Executrix of the miner's estate. Decision and Order at 2.

between the earlier evidence and the new evidence, consistent with *Grundy Mining Co. v. Flynn*, 353 F.3d 467, 23 BLR 2-44 (6th Cir. 2003); *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001; and *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). We disagree. The Sixth Circuit precedent relied on by employer construed the prior version of Section 725.309, while the current claim was filed after the effective date of the amendments to this regulation. Under the revised version of Section 725.309, claimant no longer has the burden of proving a "material change in condition;" rather, claimant must show that one of the applicable conditions of entitlement has changed since the prior denial by submitting new evidence developed in connection with the current claim that establishes an element of entitlement upon which the prior denial was based. *See* 20 C.F.R. §725.309(d)(2), (3); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*). The Director notes that, in revising Section 725.309, the Department of Labor intended to afford full effect to the Fourth Circuit's decision in *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), which rejected the Sixth Circuit's requirement that the factfinder consider the qualitative difference between earlier and current evidence. Director's Brief at 2; *see* 65 Fed. Reg. 79968 (Dec. 20, 2000); 64 Fed. Reg. 54984 (Oct. 8, 1999).

In the present case, the administrative law judge determined that the prior denial was based upon the miner's failure to establish any element of entitlement. Decision and Order at 2, 5; Director's Exhibit 2. The administrative law judge accurately reviewed the newly submitted evidence and acted within her discretion in finding that, although the evidence did not establish pneumoconiosis at Section 718.202(a)(1)-(3), the weight of the medical opinions established the existence of legal pneumoconiosis, as defined at 20 C.F.R. §718.201(a)(2), pursuant to Section 718.202(a)(4). Decision and Order at 5-14. In so finding, the administrative law judge permissibly accorded significant weight to the opinions of Drs. Gottschall and Johnson, that while smoking was also a factor, coal dust exposure substantially contributed to the miner's chronic obstructive pulmonary disease (COPD), emphysema and chronic bronchitis, as she found them to be well reasoned, persuasive, and supported by the objective evidence of record.[2] Decision and Order at

[2] Contrary to employer's arguments, *see* Employer's Brief at 18-20, the administrative law judge could properly find that the opinions of Drs. Gottschall and Johnson were reasoned and documented, as they were based on the results of physical examinations, objective testing, symptoms, and social, medical and employment histories, and the physicians explained how the miner's symptoms and the objective findings supported their conclusions. Decision and Order at 7-9, 12-14; Director's Exhibits 14, 16; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). While the administrative law judge acknowledged Dr. Johnson's status as the miner's treating physician for many years prior to the miner's death, she did not accord enhanced weight to Dr. Johnson's opinion based on that status; rather, the administrative law judge permissibly found that the opinions of Drs. Johnson and Gottschall were persuasive and

12-13; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Contrary to employer's arguments, the administrative law judge did not find the conflicting opinions of employer's experts to be hostile to the Act, but permissibly accorded less weight to the opinion of Dr. Rosenberg, that the pattern of the miner's COPD, *i.e.*, marked air trapping, markedly reduced FEV_1 and bronchodilator response, was characteristic of an impairment related to smoking but not coal dust exposure, as Dr. Rosenberg did not describe the characteristics of a coal dust related impairment or explain why the miner's extensive coal dust exposure was not a contributing cause, along with smoking, of the obstructive impairment which was only partially reversible, *see generally Clark v. Karst-Robbins Coal Co.* 12 BLR 1-149 (1989)(*en banc*); and Dr. Rosenberg's disagreement with the concept that legal pneumoconiosis was a latent and progressive condition which could manifest after coal dust exposure ceased was contrary to the explicit provisions of the regulations. Decision and Order at 13-14; *see* 20 C.F.R. §718.201(c); *see generally Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004); *see also Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (2004)(*en banc recon.*); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004)(*en banc recon.*)(McGranery, J., concurring and dissenting). Similarly, the administrative law judge acted within her discretion in according less weight to the opinion of Dr. Broudy, that the miner's obstructive airways disease was due solely to smoking, as she rationally inferred that Dr. Broudy did not believe it was possible for a miner to develop disabling legal pneumoconiosis after coal mine employment ended, absent evidence of progressive massive fibrosis;[3] and as she found that Dr. Broudy stressed the miner's lack of clinical pneumoconiosis and restriction, but failed to adequately address legal pneumoconiosis and convincingly explain why the miner's significant coal dust exposure was not a

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credible, and that the contrary opinions of Drs. Rosenberg and Broudy were not. Decision and Order at 12-14; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002).

[3] Dr. Broudy diagnosed a totally disabling obstructive airways disease and noted that after coal mine employment ended in 1989, the miner's impairment progressed from mild in 1992 to moderately severe or severe in 2002. Dr. Brody stated that pneumoconiosis generally caused a primarily restrictive defect which would not progress this rapidly once coal dust exposure ceased, and that given the severity of the miner's impairment, one would expect to see advanced simple pneumoconiosis with evidence of progressive massive fibrosis; however, the majority of x-ray readings were negative for pneumoconiosis, and the remainder found only very early disease. Dr. Broudy thus attributed the impairment to the miner's 27-year history of heavy smoking, and found no evidence that coal dust exposure was a contributing cause of the impairment. Decision and Order at 11, 14; Employer's Exhibit 5.

contributing factor in his obstructive impairment. Decision and Order at 14; Employer's Exhibit 5; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). The administrative law judge's findings and inferences are supported by substantial evidence, and we may not substitute our judgment. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). As the administrative law judge found that the remaining opinion of Dr. Amisetty was internally inconsistent,[4] *see generally Puleo v. Florence Mining Co.*, 8 BLR 1-198 (1984), we affirm her reliance on the reasoned opinions of Drs. Gottschall and Johnson to support her finding that the weight of the new evidence established legal pneumoconiosis pursuant to Section 718.202(a)(4), and a change in an applicable condition of entitlement pursuant to Section 725.309(d).

The administrative law judge then properly reviewed the earlier evidence and determined that, while it did not establish clinical pneumoconiosis, the medical opinions of record in the miner's previous claims did not address the issue of legal pneumoconiosis or persuasively exclude the miner's coal dust exposure as a factor in his obstructive impairment. Decision and Order at 15; *see Cornett*, 227 F.3d 569, 22 BLR 2-107. Consequently, weighing the earlier evidence together with the evidence submitted in support of this subsequent claim, the administrative law judge acted within her discretion in finding that the reasoned opinions of Drs. Gottschall and Johnson were entitled to determinative weight. Decision and Order at 15; *see Napier*, 301 F.3d 703, 22 BLR 2-537. As substantial evidence supports the administrative law judge's findings pursuant to Section 718.202(a)(4), they are affirmed.

Employer next challenges the administrative law judge's finding that the miner established total respiratory disability pursuant to Section 718.204(b)(2), arguing that the administrative law judge ignored relevant evidence, failed to apply the proper criteria, and incorrectly found that the three most recent pulmonary function studies produced qualifying values. Employer's arguments have merit.

At Section 718.204(b)(2)(i), the administrative law judge noted that the regulations do not specify qualifying pulmonary function study values for a miner over the age of 71, and that the miner's most recent tests were administered when he was either age 78 or 79. While there was a discrepancy in the miner's reported height, with Drs. Gottschall and Amisetty listing the miner as 66 inches tall and Dr. Rosenberg listing the miner as 69 inches tall, the administrative law judge determined that she need not resolve the discrepancy, as she found that the three most recent tests produced qualifying

[4] The administrative law judge determined that Dr. Amisetty diagnosed chronic bronchitis due to smoking and occupational dust exposure, but indicated on a form questionnaire that the miner's impairment was due to smoking. Decision and Order at 7, 12; Director's Exhibit 12.

values at either height for a miner at age 71, and concluded that the tests would also be qualifying if the table values continued to decrease in a like pattern to reflect the age of the miner at the time of his testing.[5] Decision and Order at 15-16. Although we reject employer's argument that pulmonary function studies obtained after age 71 cannot qualify to establish total disability,[6] employer correctly maintains that not all of the miner's values were qualifying for a 66-inch-tall miner at age 71, nor would they all be qualifying when he reached age 78 or 79.[7] Moreover, the administrative law judge did not review and weigh the results of Dr. Rosenberg's pulmonary function study obtained on December 10, 2002, *see* Employer's Exhibit 1, Hearing Transcript at 26, nor did she address the earlier evidence and provide a sufficient rationale for the weight assigned to each of the pulmonary function studies of record. As the administrative law judge misconstrued the quality and quantity of the evidence, we vacate her findings pursuant to Section 718.204(b)(2)(i), and remand this case for the administrative law judge to determine the miner's correct height; to extrapolate the appropriate table values in order to determine which tests are qualifying; and then to weigh all of the record evidence thereunder.[8] *See generally Tanner v. Freeman United Coal Co.*, 10 BLR 1-85 (1987); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

[5] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[6] The Board has held that an administrative law judge may reasonably extrapolate the table values for a miner over the age of 71. *See Hubble v. Peabody Coal Co.*, BRB No. 95-2233 BLA (Dec. 20, 1996)(unpub.); *Fraley v. Peter Cave Coal Mining Co.*, BRB No. 99-1279 BLA (Nov. 24, 2000)(unpub.).

[7] Appendix B lists a qualifying FEV_1 value of 1.57 or less for a 66.1" miner at age 71; extrapolating the table values for a miner of that height at age 78, the qualifying FEV_1 value would be 1.46 or less; and at age 79, the qualifying FEV_1 value would be 1.44 or less. Consequently, the November 5, 2002 test does not produce qualifying values at that height, and the post-bronchodilator values of the April 19, 2004 test are also non-qualifying.

[8] As the records in the miner's two previous claims also reflect a discrepancy in the miner's reported height, *see* Director's Exhibits 1, 2, the administrative law judge should consider all of the relevant evidence of record in determining the miner's correct height on remand.

We also vacate the administrative law judge's finding that two of the three newly-submitted blood gas studies produced qualifying values pursuant to Section 718.204(b)(2)(ii), as the administrative law judge did not acknowledge or weigh the December 10, 2002 test obtained by Dr. Rosenberg, which produced non-qualifying values. *See* Employer's Exhibit 1. On remand, the administrative law judge must additionally consider the earlier blood gas studies of record and assign them appropriate weight. *See generally Tanner*, 10 BLR 1-85.

As the administrative law judge's weighing of the objective evidence of record on remand could affect her credibility determinations with regard to the medical opinions of record on the issues of total respiratory disability and disability causation, we vacate the administrative law judge's findings pursuant to Section 718.204(b)(2)(iv), (c). On remand, the administrative law judge is directed to weigh Dr. Amisetty's opinion with the remaining medical opinions,[9] and to apply the provisions at 20 C.F.R. §718.104(d) when considering the opinion of Dr. Johnson, the miner's treating physician.

After weighing the evidence in each category at Section 718.204(b)(2)(i)-(iv), the administrative law judge must then weigh the evidence of record together, like and unlike, and determine whether it is sufficient to establish total respiratory disability, *see Cornett*, 227 F.3d 569, 22 BLR 2-107; *Fields*, 10 BLR 1-19; and, if it is, the administrative law judge must consider all relevant evidence in determining whether the miner's disability was due to pneumoconiosis. 20 C.F.R. §718.204(b)(2), (c); *see also Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

[9] While the administrative law judge determined that Dr. Amisetty's opinion was internally inconsistent and thus unreliable on the issues of the existence of pneumoconiosis and disability causation, the opinion constitutes relevant evidence on the issue of total respiratory disability, which the administrative law judge is required to address and weigh. *See generally Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part, vacated in part, and this case is remanded 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