BRB No. 99-0530 BLA

HUGH T. GRIGG	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL CO.	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE CO.	)	
	)	
Carrier	)	
	)	
and	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Hugh T. Grigg, Wheatcroft, Kentucky, *pro se*.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (98-BLA-284) of Administrative Law Judge Donald W. Mosser 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 miner filed his first claim for benefits on November 14, 1994. Director's Exhibit 1. No further action was taken on this claim after it was denied by the Office of Workers' Compensation Programs (the Director), on April 18, 1995. Claimant, thereafter, filed the instant claim on May 12, 1997. In response to a denial of this claim by the Director, the claim was transferred to the Office of Administrative Law Judges for a formal hearing.

The administrative law judge found that Peabody Coal Company was the responsible operator and then addressed whether in this duplicate claim claimant established a material change in conditions within the meaning of 20 C.F.R. §725.309(d). *See also Sahara Coal Co. v. Director, OWCP [McNew]*, 946 F.2d 554, 15 BLR 2-227 (7th Cir. 1991). The claim was ultimately denied on the grounds that the evidence did not establish either the existence of pneumoconiosis or a totally disabling respiratory condition, and thus did not establish a material change in conditions.

Claimant now appeals the administrative law judge's denial of benefits.[1] Employer has filed a response brief asserting that the denial of benefits should be affirmed, and the Director has filed a letter indicating that he does not intend to participate in this 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. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989). The Board 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. Section 921(b)(3), as incorporated by 30 U.S.C. Section 932 (a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under Part 718, a claimant must establish that he has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such

[1] This appeal was filed by Ms. Kristi A. Melton who appears to be the daughter of the miner. While we will review this appeal filed without the assistance of counsel to determine whether the administrative law judge's decision is supported by substantial evidence, *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989), we will nevertheless emphasize the arguments raised by Ms. Melton in her letter to the Board.

pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Grant v. Director, OWCP*, 857 F.2d 1102, 12 BLR 2-1 (6th Cir. 1988); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Failure to prove any one of the requisite elements compels a denial of benefits. *See Anderson*, *supra*; *Baumgartner*, *supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Moreover, the United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this claim arises, has held that in order to establish a material change in conditions pursuant to Section 725.309, the fact finder must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one element of entitlement previously adjudicated against him. *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997)(en banc rehearing), *modifying*, 94 F.3d 369 (7th Cir. 1996).

After consideration of the Decision and Order and the evidence of record, we are unable to affirm the administrative law judge's denial of benefits. Claimant asserts that in weighing the x-ray evidence, the administrative law judge erred in treating Dr. Whitehead's 0/1 reading as negative for the existence of pneumoconiosis. We reject this contention. The regulations expressly provide that a reading of 0/1 does not constitute evidence of pneumoconiosis. *See* 20 C.F.R. §718.102(b).

Claimant also contends that Dr. Traughber, a physician to whom he had been referred by the Department of Labor, read the May 20, 1997, x-ray as positive for the existence of pneumoconiosis. *See* Director's Exhibit 9. However, while claimant's assertions regarding Dr. Traughber are correct, claimant's request for a remand is nevertheless denied since the administrative law judge properly, as is within his discretion, chose to give more weight to the negative reading of this x-ray by Dr. Sargent because of his superior credentials. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985), Director's Exhibit 8. In addition, since the administrative law judge properly found that all of the readings of the January 20, 1998 x-ray were negative and properly relied on superior credentials to find that the February 16, 1998 x-ray was also negative for the existence of pneumoconiosis, we affirm the administrative law judge's determination that the new x-ray evidence fails to establish the existence of pneumoconiosis. *See* Employer's Exhibits 1, 2 and 3.

Since the record does not contain any evidence relevant to 20 C.F.R. §718.202(a)(2) and since none of the presumptions outlined at 20 C.F.R. §718.202 (a)(3) are applicable, we affirm the administrative law judge's determination that the existence of pneumoconiosis cannot be established pursuant to either of these provisions.

In addressing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4),

as the administrative law judge indicated, two physicians, Drs. Houser and Traughber, submitted new medical reports diagnosing the existence of pneumoconiosis. Dr. Houser's report was properly given less weight because it was not supported by adequate rationale. *See* Decision and Order at 9. However, in questioning Dr. Traughber's rationale, the administrative law judge found that both of the ventilatory studies performed by Dr. Traughber were later invalidated by Dr. Burki due to poor effort. *See* Decision and Order at 9, Director's Exhibits 5 and 6. While it is true that Dr. Burki invalidated both of Dr. Traughber's ventilatory studies, the administrative law judge has not provided a rationale for accepting the invalidation report over the opinion of the administering physician. *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). Consequently, we vacate the administrative law judge's weighing of the medical reports at Section 718.202(a)(4), and on remand, the administrative law judge must provide a rationale if he again chooses to prefer the invalidation report over the report of the administering physician.

Turning to the issue of total disability, the administrative law judge properly found that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(c)(2) or (c)(3), and thus did not establish a material change in conditions since the record does not contain any new blood gas studies, nor any evidence of cor pulmonale with right-sided congestive heart failure.

Turning to Section 718.204(c)(1), of the five new pulmonary function studies submitted with this case, the administrative law judge did not credit the January 20, 1998 study by Dr. Gallo, Employer's Exhibit 1, as well as the two studies performed on February 16, 1998, by Dr. Houser, Employer's Exhibit 5, because the results of these studies had been questioned by the administering physician. This is proper. *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985). However, in questioning the validity of the May 20, 1997 and July 14, 1997 studies performed by Dr. Traughber, Director's Exhibits 5 and 6, as previously discussed, the administrative law judge did not provide a reason for crediting the invalidation reports over the opinion of the administering physician. *See Siegel*, *supra*. Therefore, we vacate the administrative law judge's weighing of the pulmonary function study evidence pursuant to Section 718.204(c)(1) and we remand this case for further findings consistent with this opinion.

Moreover, while the administrative law judge provided proper reasons for his weighing of the medical evidence at Section 718.204(c)(4), in light of our decision to vacate his weighing of Dr. Traughber's pulmonary function studies, we further vacate his weighing of the medical opinion evidence. On remand, it may be necessary for the administrative law judge to reconsider Dr. Traughber's medical report in light of his reconsideration of the pulmonary function study evidence. In addition, in addressing total disability pursuant to Section 718.204(c), all relevant evidence must be considered and the fact finder must address whether the evidence "contrary" to a finding of total respiratory disability outweighs the

evidence supportive of such a finding. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*), *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-4 (1986).

In sum, we vacate the administrative law judge's determination that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(4) and that total disability was not established pursuant to Section 718.204(c)(1) and (c)(4). On remand the administrative law judge must reconsider Dr. Traughber's pulmonary function study results and his medical reports and must provide a reason if he decides to accept the consulting physician's invalidation of these studies over the opinion of the administering physician. In addition, if on remand, the administrative law judge finds that the new evidence establishes a material change in conditions, he must then address all of the evidence to determine whether claimant has established entitlement to benefits. *See Spese*, *supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge