BRB No. 99-0693 BLA

MANUEL BARRON, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CANNELTON INDUSTRIES	)	
	)	DATE ISSUED:
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 of Lawrence P. Donnelly, Administrative Law Judge, United States Department of Labor.

Jason E. Huber (Forman & Crane, L.C.), Charleston, West Virginia, for claimant.

Paul E. Frampton (Bowles, Rice, McDavid, Graff & Love), Fairmont, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (97-BLA-0513) of Administrative Law Judge Lawrence P. Donnelly awarding 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 properly determined that the instant claim was a duplicate claim pursuant to 20 C.F.R. §725.309[1] and considered entitlement pursuant to 20 C.F.R. Part 718. Decision and

[1]The record indicates that claimant filed his initial claim for benefits on January 12, 1982, which was finally denied on January 24, 1985 for failure to establish the existence of pneumoconiosis. Director's Exhibit 37. Claimant filed a second claim on

Order at 2, 12. The administrative law judge, noting the proper standard, determined that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and thus sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Decision and Order at 12-14. The administrative law judge found, and the parties stipulated to, thirty-three years and three months of coal mine employment. Decision and Order at 3; Hearing Transcript at 6-7, 17-18, 23. The administrative law judge concluded that the evidence of record was sufficient to establish the existence of totally disabling pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203, 718.204(c), (b). Decision and Order at 14-15. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding a material change in conditions established as he applied an improper standard and failed to consider all of the evidence of record in concluding that the existence of pneumoconiosis was established at 20 C.F.R. §718.202(a)(4) and that claimant established that his total disability was due to pneumoconiosis at 20 C.F.R. §718.204(b). Claimant responds that the administrative law judge's Decision and Order is supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.[2]

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

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April 14, 1989. Director's Exhibit 37. The claim was finally denied on May 10, 1994 as he failed to establish the existence of pneumoconiosis and a material change in conditions. Director's Exhibit 37. Claimant took no further action until he filed the present claim on February 13, 1996. Director's Exhibit 1.

[2]The administrative law judge's length of coal mine employment determination as well as his findings pursuant to 20 C.F.R. §§718.203 and 718.204(c) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant to establish any one these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Employer initially contends that the administrative law judge erred in finding a material change in conditions established pursuant to 20 C.F.R. §725.309 as he applied an improper standard. We disagree. The administrative law judge correctly noted that the previous claim was denied as claimant did not establish the existence of pneumoconiosis. Decision and Order at 2, 12; Director's Exhibit 37. The United States Court of Appeals for the Fourth Circuit has held that in assessing whether the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309, an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him.[3] *See Lisa Lee Mines v. Director, OWCP* [Rutter], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). Consequently, in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309, the newly submitted evidence must support a finding of the existence of pneumoconiosis. Decision and Order at 2, 12; Director's Exhibit 37.

Relying upon the newly submitted medical opinions of Drs. Rasmussen, Fino and Zaldivar, the administrative law judge found that the newly submitted medical

[3]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was employed in the coal mine industry in the State of West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order at 13-14. The administrative law judge, therefore, found that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Decision and Order at 14.

Employer contends that the administrative law judge erred in relying upon the opinion of Dr. Rasmussen to establish a material change in conditions as the physician's opinion is almost identical to his previous opinion offered in the prior claim and thus is insufficient to meet the standard necessary to establish that claimant's condition has changed since the time of the prior denial. We reject employer's assertion that *Rutter* mandates that, in addition to determining whether the newly submitted evidence establishes one new element of entitlement, the administrative law judge must explain how the newly submitted evidence is qualitatively different from the previously submitted evidence.[4] *See Rutter*, *supra; see also Troup v. Reading Anthracite Coal Co.,* 22 BLR 1-11 (1999)*; contra Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). We, therefore, affirm the administrative law judge's finding that the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309.

[4] In *Rutter*, the Fourth Circuit, specifically stated, "[w]e do not endorse however, the closing paragraph of *Sharondale Corp.*, 42 F.3d [993] at 999, where,... the Sixth Circuit seems to have required consideration of the evidence behind the denial to determined whether it 'differ[s] qualitatively' from the new evidence." *Rutter*, 86 F.3d at 1363 n.11, 20 BLR at 2-237 n.11.

With respect to the merits, employer argues that the administrative law judge violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), in finding that the evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(b) in that he failed to specifically address all the medical opinions of record.[5] Employer's Brief at 14-15. We agree. In finding that claimant established the existence of pneumoconiosis and was totally disabled due to pneumoconiosis, the administrative law judge noted the opinions of Drs. Rasmussen, Fino, Zaldivar and Gaziano and stated that Dr. Rasmussen's opinion was well reasoned and documented and far more persuasive. Decision and Order at 13-14. The administrative law judge failed, however, to specifically consider the opinions of Drs. Lee, Castle, Sobieski and Loudon. Director's Exhibit 37. Under the APA, the administrative law judge is required to address all relevant evidence of record, explain the rationale employed in the case and clearly indicate the specific statutory or regulatory provision pertaining to a particular finding. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Although the administrative law judge is empowered to weigh the evidence, as he failed to consider all the medical opinions of record, the basis for the administrative law judge's credibility determinations in this particular case can not be affirmed.[6] *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984); *see also Witt v. Dean Jones Coal Co.*, 7 BLR 1-21 (1984). We therefore vacate the administrative law judge's findings under Sections

[5]Employer also asserts that the administrative law judge failed to properly consider the x-ray evidence of record. Employer's Brief at 14. Contrary to employer's contention, the administrative law judge stated that he reviewed the entire record and found that the x-ray evidence was in equipoise. Decision and Order at 14. As this finding is supported by substantial evidence and is insufficient to meet claimant's burden with respect to 20 C.F.R. §718.202(a)(1), it is affirmed. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

[6]The administrative law judge accorded less weight to the opinion of Dr. Zaldivar as his diagnosis of asthma was not supported by the opinions of Drs. Rasmussen and Fino. Decision and Order at 13. This diagnosis, however, appears to be supported by the opinions of Drs. Gaziano, Castle, Sobieski and Loudon. Director's Exhibit 37. Additionally, Dr. Fino did not rule out the possibility that claimant suffered from asthma but stated that although he did not diagnose asthma, he would not disagree with someone who did. Employer's Exhibit 5.

718.202(a)(4) and 718.204(b) and remand this case to the administrative law judge to specifically discuss all the evidence of record, the basis for finding the reports of record reasoned and documented[7] and to discuss the credibility of each opinion in light of *U.S. Steel Mining Co., Inc. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 22 BLR 2- (4th Cir. 1999).[8]

[7]On remand, the administrative law judge should make a specific smoking history determination and discuss the credibility of each opinion in light of that finding. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

[8] Contrary to employer's argument that the administrative law judge erred in finding the opinions of Drs. Fino and Zaldivar hostile to the Act, the administrative law judge merely stated that he found these opinions "to be at least partially hostile-to-the-Act," Decision and Order at 14 and provided other valid reasons for his credibility determinations *i.e.*, the opinions of Drs. Fino and Zaldivar were confusing and inconsistent.

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