BRB No. 00-0740 BLA

BETTY RUTH MILLER (o.b.o. BILLY MILLER)	)	
Claimant-Petitioner	)	
v.	)	
F & F MINING CORPORATION	)	DATE ISSUED:
and	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
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 Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Betty Ruth Miller, Cumberland Gap, Tennessee, *pro se*.[1]

Robert Weinberger (Employment Programs Litigation Unit), Charleston, West Virginia, for carrier.

Helen H. Cox (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor;

[1]Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested on behalf of claimant that the Board review the decision of Administrative Law Judge Mollie W. Neal. In a letter dated May 8, 2000, the Board stated that claimant would be considered to be representing himself on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant,[2] without the assistance of counsel, appeals the Decision and Order (99-BLA-0798) of Administrative Law Judge Mollie W. Neal denying benefits on a duplicate claim[3] 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).[4] The administrative law judge credited the miner with at least nineteen years of coal mine employment and adjudicated this duplicate claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). The administrative law judge also found the newly submitted evidence insufficient to establish

[2]Claimant is the widow of the miner, Billy Miller, who died on February 10, 1998. Director's Exhibit 60. Claimant filed a survivor's claim on July 21, 1998, Director's Exhibit 59, which was denied on December 18, 1998, Director's Exhibits 66, 67. On November 5, 1999, the administrative law judge issued an order granting claimant's request to withdraw her survivor's claim.

[3]The miner filed his initial claim on August 23, 1974. Director's Exhibit 53. This claim was denied by the Department of Labor (DOL) on March 10, 1980 because the evidence was insufficient to establish the existence of pneumoconiosis and total disability. *Id*. Inasmuch as the miner did not pursue this claim any further, the denial became final. The miner filed his most recent claim on October 31, 1994. Director's Exhibit 1. Although the DOL denied benefits on May 3, 1995, Director's Exhibit 14, the DOL subsequently awarded benefits on December 4, 1995, Director's Exhibit 28. However, in response to employer's request for reconsideration, the DOL issued a denial of benefits. Director's Exhibit 37. Claimant filed a request for modification on December 26, 1996. Director's Exhibit 40.

[4]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). Consequently, the administrative law judge found the evidence insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[5] In addition, the administrative law judge found the evidence insufficient to establish a change in conditions and a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). On appeal, claimant generally challenges the administrative law judge's denial of benefits. Neither employer/carrier nor the Director, Office of Workers' Compensation Programs (the Director), has filed a brief in response to claimant's appeal.[6]

[5]The revisions to the regulations at 20 C.F.R. §§725.309 and 725.310 apply only to claims filed after January 19, 2001.

[6]Inasmuch as the administrative law judge's length of coal mine employment finding, which is not adverse to claimant, is not challenged on appeal, we affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 2, 2001, to which carrier and the Director have responded. The Director indicated that it is her position that the instant case would not be affected by application of the revised regulations. The Director, therefore, indicated that the Board could decide the instant case. Carrier, however, argued that the revisions to the regulations at 20 C.F.R. §§718.201(a)(2) and 718.201(c) would affect the outcome of the case.[7] Claimant has not filed a brief in response to the Board's order.[8] Based on the briefs submitted by carrier and the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *See McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *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).

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[7]Application of the revised definition of pneumoconiosis would not alter the outcome of the instant case. 20 C.F.R. §718.201. None of the physicians who diagnosed chronic obstructive pulmonary disease related this condition to the miner's coal mine employment. Consequently, the revisions to 20 C.F.R. §718.201(a)(2) would not affect the outcome of the instant case. Further, inasmuch as there is no evidence which pertains to the revisions at 20 C.F.R. §718.201(c), the revisions to this regulation would not affect the outcome of the instant case. Moreover, no substantive revisions have been made to the regulations which are relevant to the issue of the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), (a)(3) and (a)(4). Lastly, inasmuch as there is no biopsy evidence of record, the revisions to the regulations at 20 C.F.R. §718.202(a)(2) would not alter the outcome of the instant case.

[8]Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on March 2, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

This case involves a request for modification of a duplicate claim. The Board has held that in considering whether a claimant has established a change in conditions at 20 C.F.R. §725.310 (2000), an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). The prior claim was denied because the evidence was insufficient to establish the existence of pneumoconiosis and total disability. Director's Exhibit 53. Consequently, the issues properly before the administrative law judge were whether the newly submitted evidence was sufficient to establish either the existence of pneumoconiosis or total disability.

Section 725.309 (2000) provides that a duplicate claim is subject to automatic denial on the basis of the prior denial, unless there is a determination of a material change in conditions since the denial of the prior claim. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, adopted a standard whereby an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him, and thereby has established a material change in conditions at 20 C.F.R. §725.309(d) (2000). *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). As previously noted, the prior claim was denied because the evidence was insufficient to establish the existence of pneumoconiosis and total disability. Director's Exhibit 53. Consequently, in order to establish a material change in conditions at 20 C.F.R. §725.309 (2000), the newly submitted evidence must support a finding of pneumoconiosis or a finding of total disability. Furthermore, in order to establish a change in conditions at 20 C.F.R. §725.310 (2000), the newly submitted evidence must support a finding of pneumoconiosis or a finding of total disability.

In finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) (2000), the administrative law judge weighed the newly submitted x-ray, autopsy and medical opinion evidence of record together. The administrative law judge stated, "I find the autopsy evidence to be the most reliable evidence of the existence of pneumoconiosis." Decision and Order at 16; *see Terlip v. Director, OWCP*, 8 BLR 1-363 (1985); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985). Of the thirty-six newly submitted x-ray interpretations, twenty-nine readings are negative for pneumoconiosis, Director's Exhibits 30, 36, 39, 44, 56, 63, four readings are positive, Director's Exhibits 12, 24, 25, 29, 43, and three x-rays are unreadable, Director's Exhibits 13, 41, 42. In the only autopsy report of record, Dr. Blake opined that the miner did not

suffer from anthracosilicosis or pneumoconiosis. Director's Exhibit 62. With regard to the newly submitted medical opinion evidence of record,[9] the administrative law judge stated that "none of the physicians who examined the miner or reviewed his medical records after the March 1980 denial, except for Dr. Seargent and Dr. Debusk, attending physician at Claiborne County Hospital, diagnosed pneumoconiosis."[10] Decision and Order at 17. Since the administrative law judge rationally found the autopsy report of Dr. Blake to be the most reliable evidence of the existence of pneumoconiosis, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis.[11] *See* 20 C.F.R. §718.202(a); *Terlip, supra*; *Fetterman, supra*; *see generally Island Creek Coal Co. v. Compton*, 211 F.3d 303, BLR (4th Cir. 2000). In addition, since the administrative law judge rationally found that the previously submitted evidence of record is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) (2000), we hold that the evidence is insufficient to establish the existence of pneumoconiosis on the merits. *See* 20 C.F.R. §718.202(a).

Since claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), an essential element of entitlement, we hold that the administrative law judge

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[9]The record also contains a death certificate. Director's Exhibit 60. The administrative law judge correctly stated that "[t]he death certificate lists pneumoconiosis as a cause of death." Decision and Order at 16. The administrative law judge permissibly discredited the death certificate because "the clinical findings upon which the opinion is based are not indicated." Decision and Order at 16; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

[10]Whereas Drs. Debusk and Seargent opined that the miner suffered from pneumoconiosis, Director's Exhibits 26, 63, Drs. Dahhan, Fino and Hippensteel opined that the miner did not suffer from pneumoconiosis, Director's Exhibits 29, 34, 35. Although Drs. Pannocchia and Smith opined that the miner suffered from chronic obstructive pulmonary disease, they did not relate this condition to the miner's coal mine employment. *See Shoup v. Director, OWCP*, 11 BLR 1-110 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*); Director's Exhibits 39, 63.

[11]We also affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis since there is no evidence of complicated pneumoconiosis in this claim filed after January 1, 1982 by the miner, who died after March 1, 1978. *See* 20 C.F.R. §§718.202(a)(3), 718.304, 718.305, 718.306.

properly denied benefits under 20 C.F.R. Part 718.[12] *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY

[12]In view of our disposition of the case at 20 C.F.R. §718.202(a) on the merits, we decline to address the administrative law judge's findings at 20 C.F.R. §§718.204(c)(2000) 725.309 (2000) and 725.310 (2000). *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Administrative Appeals Judge