

BRB No. 02-0537 BLA

RALPH E. CUMMINS)
)
 Claimant-Petitioner)
)
 v.)
)
 LODESTAR ENERGY,)
 INCORPORATED) DATE ISSUED:
) _____)
 and)
)
 COSTAIN AMERICA,)
 INCORPORATED/ UNDERWRITERS)
 SAFETY CLAIMS)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT OF)
 LABOR)
) DECISION AND ORDER

Party-in-Interest

Appeal of the Decision and Order - Denying Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for claimant.

Stanley S. Dawson (Fulton & Devlin), Louisville, Kentucky, for employer.

Mary Forrest-Doyle (Howard Radzely, Acting Solicitor of Labor; Donald S. Shire, 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:

Claimant appeals the Decision and Order - Denying Benefits (2001-BLA-0815) of Administrative Law Judge Thomas F. Phalen, Jr. 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).¹ The administrative law judge determined the instant case to be a duplicate claim under 20 C.F.R. §725.309 (2000),² and adjudicated the claim pursuant to 20 C.F.R. Part 718, based on claimant's March 9, 2000 filing date.³ Initially, the administrative law judge credited claimant with fifteen years of coal mine employment, based on a stipulation of the parties, and found Lodestar Energy, Incorporated to be the properly named responsible operator. Addressing the merits of the duplicate claim, the administrative law judge noted that the prior claim was denied because claimant failed to establish the existence of pneumoconiosis or the existence of a totally disabling respiratory impairment. Weighing the newly submitted medical evidence of record, the administrative law judge found that the new evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). In addition, the administrative law judge found that the new medical evidence did not establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b).⁴ Therefore, the administrative law judge found that the newly

¹ 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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

² The amendments to the regulations at 20 C.F.R. §725.309 (2000) do not apply to claims, such as this one, which were pending on January 19, 2001. 20 C.F.R. §725.2.

³ Claimant filed his original application for benefits on December 5, 1994, Director's Exhibit 30-1. In an Order dated July 11, 1996, the district director denied benefits, finding that no elements of entitlement under Part 718 were established. Director's Exhibit 30-46. No further action was taken on that claim.

⁴ The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), is now found at 20 C.F.R. §718.204(b).

submitted evidence was insufficient to establish a material change in conditions pursuant to Section 725.309 (2000). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis or the existence of a total respiratory disability and, thus, a material change in conditions. Claimant also contends that the administrative law judge erred in considering the medical report of Dr. Westerfield, regarding a material change in conditions, since the medical opinion was based, at least in part, on evidence developed prior to the previous denial. In response, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief, urging the Board to reject claimant's contention that the administrative law judge erred in crediting the medical opinion of Dr. Westerfield. The Director has not otherwise responded on the merits of entitlement.⁵

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that in order to determine whether a material change in conditions is established under Section 725.309(d) (2000), the administrative law judge must consider all of the newly submitted evidence and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him. See *Sharondale Corp. v. Ross*, 42 F.3d 993,

⁵ The parties do not challenge the administrative law judge's decision to credit claimant with fifteen years of coal mine employment, his determination that Lodestar Energy, Inc., is the responsible operator, or his findings under 20 C.F.R. §§718.202(a)(1)-(3) and 718.204(b)(2)(i)-(iii). These findings are therefore affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

19 BLR 2-10 (6th Cir. 1994); see also *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001). If claimant establishes the existence of that element, he has demonstrated, as a matter of law, a material change in conditions and the administrative law judge must then consider whether all of the evidence of record, including the evidence submitted with claimant's prior claim, supports a finding of entitlement to benefits. *Id.*

Initially, we reject claimant's contention that the administrative law judge erred in considering Dr. Westerfield's November 2001 medical report in determining whether the newly submitted evidence was sufficient to establish a material change in conditions pursuant to Section 725.309 (2000).⁶ Specifically, claimant argues that since this opinion is based, at least in part, on evidence developed prior to the filing date of claimant's duplicate claim, it is not "new evidence" as required under Section 725.309 (2000) and *Ross*. Claimant's Brief at 8, 9. Contrary to claimant's contention, the administrative law judge reasonably considered the medical opinion of Dr. Westerfield since it was authored after the date of the prior denial of benefits, see Director's Exhibit 30-46, and is also based, in part, on evidence developed since the prior denial. See Employer's Exhibit 1. Consequently, it was not inherently unreasonable for the administrative law judge to consider the medical report of Dr. Westerfield, in its entirety, in determining whether the new evidence is sufficient to establish whether there has been a material change in claimant's physical condition since the prior denial. See *Kirk, supra*; *Ross, supra*; see generally *Lovilia Coal Co. v. Harvey*, 109 F.3d 445, 21 BLR 2-50 (8th Cir. 1997).

In challenging the administrative law judge's finding that the newly submitted evidence of record was insufficient to establish a material change in conditions, claimant argues that the administrative law judge erred in finding the new medical evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Specifically, claimant contends that the September 2001 medical report of Dr. Settle is sufficient to establish the existence of

⁶ Claimant also contends that the administrative law judge erred in considering the July 2000 report of Dr. Settle because it too was not "new" evidence. Claimant's Brief at 9. We need not address the specifics of claimant's argument because the administrative law judge rationally found this opinion not reasoned or documented because the physician did not state with specificity upon what evidence he relied in rendering his opinion. Decision and Order at 10; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

pneumoconiosis pursuant to Section 718.202(a). Claimant also contends that the administrative law judge erred in his weighing of the other medical opinions of record.

The administrative law judge, in weighing the medical opinion evidence pursuant to Section 718.202(a)(4), while considering Dr. Settle's July 25, 2000 report did not specifically discuss the September 2001 report of Dr. Settle, which included the statement that claimant has an environmental lung disease, dust, coal mine and black lung damage to his lungs. Claimant's Exhibit 1. Since the administrative law judge has not considered all of the evidence relevant to Section 718.202(a)(4), we vacate his findings and remand the case to the administrative law judge to consider Dr. Settle's September 2001 opinion. See *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *Branham v. Director, OWCP*, 2 BLR 1-111 (1979).

However, on remand, contrary to claimant's contention, Dr. Settle's opinion is not mechanically entitled to greater weight based on his status as claimant's treating physician. Rather, that is one factor to consider in weighing the evidence. In particular, because this report was authored after implementation of the new regulations, the administrative law judge, must determine not only the credibility of the medical report, but also whether it is well reasoned and documented. In addition, the administrative law judge must evaluate the treatment relationship of the physician to the miner in determining whether the treating physician's opinion is entitled to greater weight. 20 C.F.R. §718.104(d); see *Jericol Mining, Inc. v. Napier*, 311 F.3d 703, BLR (6th Cir. 2002); *Wolfe Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, BLR (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 834, 22 BLR 2-320 (6th Cir. 2002); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993).

Furthermore, we reject claimants' contention that the administrative law judge erred in crediting the medical opinion of Dr. O'Bryan as a diagnosis that claimant was not suffering from pneumoconiosis, arguing that the physician did not consider whether claimant was suffering from legal pneumoconiosis. The administrative law judge reasonably found that Dr. O'Bryan did not rely solely upon an x-ray interpretation because the physician considered not only whether claimant suffered from pneumoconiosis, but also affirmatively stated that claimant's total respiratory disability was due to his heart disease and excessive weight. Decision and Order at 10; Director's Exhibit 6; see *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Consequently, we affirm the

administrative law judge's finding that Dr. O'Bryan's medical opinion did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Nevertheless, we vacate the administrative law judge's finding that the newly submitted medical evidence is insufficient to establish the existence of pneumoconiosis and remand the case to the administrative law judge for specific consideration of Dr. Settle's September 2001 medical opinion.

Turning to the administrative law judge's finding that the newly submitted medical evidence is insufficient to establish a total respiratory disability pursuant to Section 718.204(b)(2)(iv), claimant argues that the administrative law judge erred in finding that the medical report of Dr. Canonico is not relevant on the issue of total disability. This contention is without merit. While Dr. Canonico diagnoses a "probable moderate restrictive lung disease" and "restrictive lung disease/interstitial lung disease," the physician does not provide an opinion regarding any functional impairment or limitations resulting from the diagnosed restrictive lung disease. Claimant's Exhibit 1. Consequently, the physician has not provided a sufficient diagnosis with which the administrative law judge can compare the exertional requirements of claimant's usual coal mine employment to determine whether claimant is totally disabled. 20 C.F.R. §718.204(b)(2)(iv); see *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd*, 9 BLR 1-104 (1986)(*en banc*); see also *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989).

Moreover, we reject claimant's contention that the administrative law judge erred in failing to accord greater weight to the opinion of Dr. O'Bryan, that claimant is totally disabled, over the contrary opinion of Dr. Westerfield because Dr. O'Bryan examined claimant. Contrary to claimant's contention, the administrative law judge is not required to mechanically accord greater weight to an examining physician. Rather, it is one element to be considered by the administrative law judge. See *Napier, supra*; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Worthington v. United States Steel Corp.*, 7 BLR 1-522 (1984). Herein, the administrative law judge discussed the opinions of Drs. O'Bryan and Westerfield, finding that both of the opinions were well reasoned and documented, see Decision and Order at 5-7, 10, and, thus, reasonably determined that these opinions were in equipoise because Dr. O'Bryan opined that claimant was unable to return to his usual coal mine employment and Dr. Westerfield concluded that there was little, if any impairment.⁷ Decision and Order at 12; Director's Exhibit 6; Employer's

⁷ Contrary to claimant's contention, the opinion of Dr. Westerfield is not hostile to the Act as the physician does not foreclose all possibility that simple pneumoconiosis can be totally disabling. Employer's Exhibit 1; *Searls v.*

Exhibit 1. Since claimant bears the burden of establishing each of the elements of entitlement by a preponderance of the evidence, we affirm the administrative law judge's finding that claimant failed to establish a total respiratory disability pursuant to Section 718.204(b)(2)(iv). Decision and Order at 12; *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994). Consequently, we affirm the administrative law judge's finding that claimant has not established a material change conditions based on this element of entitlement.

If, however, on remand, the administrative law judge finds that the newly submitted evidence establishes the existence of pneumoconiosis pursuant to Section 718.202(a)(4), he must then determine whether the evidence as a whole, old and new, is sufficient to establish entitlement to benefits pursuant to Part 718. *Kirk, supra; Ross, supra.*

Southern Ohio Coal Co., 11 BLR 1-161 (1988).

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.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge