BRB No. 98-1026 BLA

AMOS BRYANT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
RIVER HURRICANE COAL, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Amos Bryant, Pikeville, Kentucky, *pro se*.[1]

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

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

PER CURIAM:

[1]Susie Davis, a benefits counselor with the Kentucky Black Lung Association, requested on behalf of claimant that the Board review the administrative law judge's decision. *See generally Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Claimant, representing himself, appeals the Decision and Order on Remand (95-BLA-0378) of Administrative Law Judge Clement J. Kichuk denying 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). This case involving a 1993 duplicate claim[2] is before the Board for the second time. In the initial decision, Administrative Law Judge Edith Barnett found, *inter alia*, that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). Judge Barnett therefore found that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, Judge Barnett denied benefits. By Decision and Order dated October 30, 1996, the Board, citing *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), held that in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309, the newly submitted evidence must support either a finding of the existence of pneumoconiosis or a finding of total disability. *Bryant v. River Hurricane Coal, Inc.,* BRB No. 96-0106 BLA (Oct. 30, 1996) (unpublished). Although the Board affirmed Judge Barnett's finding that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c), the Board vacated Judge Barnett's denial of benefits and remanded the case to Judge Barnett to determine whether the newly submitted evidence was sufficient to establish the existence of

[2]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on February 23, 1981. Director's Exhibit 47. In a Decision and Order dated June 24, 1985, Administrative Law Judge Robert S. Amery found that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id.* However, Judge Amery found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). *Id.* Accordingly, Judge Amery denied benefits. *Id.* There is no indication that claimant took any further action in regard to his 1981 claim.

Claimant filed a second claim on March 21, 1990. Director's Exhibit 48. The district director denied the claim on August 7, 1990. *Id.* The district director found that the evidence was insufficient to establish that claimant suffered from pneumoconiosis; that the pneumoconiosis was caused by coal mine work; or that claimant was totally disabled by pneumoconiosis. *Id.* The district director further found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. *Id.* There is no indication that claimant took any further action in regard to his 1990 claim.

Claimant filed a third claim on August 5, 1993. Director's Exhibit 1.

pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). *Id.* If Judge Barnett, on remand, found the newly submitted evidence sufficient to establish the existence of pneumoconiosis, thereby establishing a material change in conditions pursuant to 20 C.F.R. §725.309, the Board instructed Judge Barnett to consider claimant's 1993 claim on the merits. *Id.* The Board subsequently summarily denied employer's motion for reconsideration. *Bryant v. River Hurricane Coal, Inc.,* BRB No. 96-0106 BLA (Mar. 20, 1997) (Order) (unpublished).

Due to Judge Barnett's unavailability, Administrative Law Judge Clement J. Kichuk (the administrative law judge) reconsidered the claim on remand. The administrative law judge found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge, therefore, found that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

In determining whether the newly submitted x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge properly accorded greater weight to the interpretations rendered by physicians with the dual qualifications of B reader and Board-certified radiologist. *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order on Remand at 7. The administrative law judge properly noted that a majority of the x-ray interpretations rendered by readers with these qualifications is negative for pneumoconiosis. Although Dr. Bassali, a B reader and Board-certified radiologist, interpreted claimant's March 16, 1994 x-ray as positive for pneumoconiosis, Claimant's Exhibit 1, Drs. Spitz and Wiot, two equally qualified physicians, interpreted a contemporaneous March 1, 1994 x-ray as negative for pneumoconiosis. Director's Exhibit 41. The remaining two positive x-ray interpretations of record were rendered by Drs. Sundaram and Lim, neither of whom

possesses any special radiological qualifications.[3] Director's Exhibits 8, 9. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Inasmuch as the record does not contain any biopsy or autopsy evidence, the administrative law judge properly found that claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order on Remand at 8. The administrative law judge also properly found that claimant is not entitled to any of the presumptions set out at 20 C.F.R. §718.202(a)(3).[4] *Id.*

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[3]Drs. Lim and Sundaram interpreted claimant's October 5, 1993 x-ray as positive for pneumoconiosis. Director's Exhibits 8, 9. Drs. Wheeler, Scott, Sargent and Wiot, each of whom is dually qualified as a B reader and Board-certified radiologist, interpreted claimant's October 5, 1993 x-ray as negative for pneumoconiosis. Director's Exhibits 7, 42; Employer's Exhibit 6.

Dr. Dahhan, a B reader, also interpreted claimant's most recent x-ray, an x-ray taken on April 21, 1995, as negative for pneumoconiosis. Employer's Exhibit 5.

[4]Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed the instant claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, inasmuch as the instant claim is not a survivor's claim, the Section 718.306 presumption is also inapplicable.

See 20 C.F.R. §718.306.

In considering whether the newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge properly accorded less weight to Dr. Sundaram's finding of pneumoconiosis because the x-ray that he interpreted as positive for pneumoconiosis was read by more qualified physicians as negative for pneumoconiosis,[5] thus calling into question the reliability of his opinion. *See Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983); Decision and Order on Remand at 12; Director's Exhibits 5, 7, 9, 42; Employer's Exhibit 6. The administrative law judge also acted within his discretion in according less weight to Dr. Sundaram's opinion because he failed to provide an explanation for his diagnosis of pneumoconiosis. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order on Remand at 12; Director's Exhibit 5.

The administrative law judge noted that the only other newly submitted medical opinion that could conceivably support a finding of pneumoconiosis was that of Dr. Broudy. In a report dated April 6, 1995, Dr. Broudy, after reviewing the medical evidence of record, stated that the data "provides sufficient of coal workers' pneumoconiosis." Employer's Exhibit 3. The administrative law judge agreed with Judge Barnett's earlier assessment that it was unclear whether Dr. Broudy believed that claimant suffered from pneumoconiosis because some language appeared to be missing from his report. Decision and Order on Remand at 13. The administrative law judge noted that if Dr. Broudy did, in fact, diagnose pneumoconiosis in his April 6, 1995 report, this constituted an unexplained change from Dr. Broudy's earlier March 1, 1994 report, wherein Dr. Broudy opined that claimant did not suffer from pneumoconiosis. *Id.*; *see* Director's Exhibit 40. However, even assuming that Dr. Broudy diagnosed pneumoconiosis, the administrative law judge acted within his discretion in according less weight to Dr. Broudy's opinion because he failed to explain the basis for any finding that claimant suffered from pneumoconiosis. *See Clark*, *supra*; *Lucostic*, *supra*;; Decision and Order on Remand at 13; Director's Exhibit 40.

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[5]Dr. Sundaram, who does not possess any special radiological qualifications, interpreted claimant's October 5, 1993 x-ray as positive for pneumoconiosis. Director's Exhibit 9. Drs. Wheeler, Scott, Sargent and Wiot, each of whom is dually qualified as a B reader and Board-certified radiologist, interpreted this x-ray as negative for pneumoconiosis. Director's Exhibits 7, 42; Employer's Exhibit 6. Although Dr. Lim also interpreted claimant's October 5, 1993 x-ray as positive for pneumoconiosis, the record does not indicate that he has any special radiological qualifications. Director's Exhibit 8.

The administrative law judge noted that the remaining physicians of record, Drs. Dahhan, Fino, Lane and Branscomb, all opined that claimant did not suffer from pneumoconiosis. Director's Exhibit 45; Employer's Exhibits 1, 4, 5. Inasmuch as it is supported by substantial evidence, the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) is affirmed.

In light of our affirmance of the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), we affirm the administrative law judge's finding that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. *Ross*, *supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge