BRB No. 00-1074 BLA

CLARENCE E. BROWN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DOMINION COAL CORPORATION	)	
	)	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 of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Clarence E. Brown, Raven, Virginia, *pro se*.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Michelle S. Gerdano (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant, representing himself,[1] appeals the Decision and Order (99-BLA-1180) of

Administrative Law Judge Joseph E. Kane 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).[2] The instant case involves a duplicate claim filed on October 15, 1998.[3] The administrative law judge found the evidence insufficient 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 (the Director), has filed a Motion to Remand, requesting that the Board remand the case for reconsideration of whether the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[4] In a reply brief, employer objects to the Director's Motion to Remand.

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).

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that in assessing whether a material change in conditions has been established, an administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1995), *cert. denied*, 117 S.Ct. 763 (1997). Claimant's 1994 claim was denied because claimant failed to establish that he was totally disabled due to pneumoconiosis. Director's Exhibit 30. Consequently, in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), the newly submitted evidence must support a finding of total disability.

All of the newly submitted pulmonary function and arterial blood gas studies are non-qualifying. Director's Exhibits 8, 12; Claimant's Exhibits 7, 10; Employer's Exhibit 8. There is no newly submitted medical opinion evidence that supports a finding that claimant suffers from a totally disabling respiratory or pulmonary impairment[5] and no evidence of cor pulmonale with right sided congestive heart failure. Inasmuch as it is based upon substantial evidence, we affirm the alj's finding that the newly submitted evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000)[6] and, therefore, insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).

The record, however, contains newly submitted evidence supportive of a finding of complicated pneumoconiosis. This evidence, if credited, could establish entitlement to the irrebuttable presumption set out at 20 C.F.R. §718.304[7] and, therefore, to a finding of a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).

In his consideration of whether the newly submitted evidence was sufficient to establish the existence of complicated pneumoconiosis, the administrative law judge stated:

> Entitlement to benefits thus comes down to two issues. (1) does the claimant have complicated pneumoconiosis, and thus the benefit of the §718.304 presumption of total disability due to pneumoconiosis? [and] (2) does a finding of complicated pneumoconiosis establish a material change in conditions from the previous denial?
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> In regards to the second issue, it is highly significant that the newly submitted evidence does not differ qualitatively from that previously submitted. The crux of the debate is still whether the large lesion, which is undisputably present on the x-rays is due to complicated coal workers' pneumoconiosis or a granulomatous disease, particularly tuberculosis. The interpretations of the x-rays still differ accordingly, and the reasons given in support of those interpretations are still the same. As before, the claimant's PPD and sputum tests are negative.
>
> Judge Tureck found that the weight of the evidence established that the large mass was due to tuberculosis, not coal workers' pneumoconiosis. Were I to find complicated pneumoconiosis instead, what would be shown is a *mistake* in the prior determination, not a material change in conditions. And mistakes of fact can only be corrected through modification proceedings, which is no longer an option available to claimant. *Compare* §725.310 with §725.309(d). As the Court of Appeals for the Fourth Circuit pointed out, "[t]he purpose of section 725.309(d) is not to allow a claimant to revisit an earlier denial of benefits, but rather only to show that his condition has materially changed since the earlier denial." *Lisa Lee*. Therefore, after careful consideration of the evidence and the law, I find that the newly developed evidence does not show a material change in condition, and as such, the claimant's claim for benefits must be denied.

Decision and Order at 13 (footnote omitted).

The Director contends that the administrative law judge erred in focusing upon Judge Tureck's finding that the evidence was insufficient to establish the existence of complicated pneumoconiosis. We agree. In considering whether the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), the administrative law judge should have independently considered whether the newly submitted medical evidence was sufficient to establish the existence of complicated pneumoconiosis.[8] *See Rutter*, *supra*. Consequently, we vacate the administrative law judge's finding that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000) and remand the case for further consideration. On remand, the administrative law judge is instructed to specifically consider and determine whether the newly submitted evidence is sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, thereby establishing a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).

Should the administrative law judge, on remand, find the newly submitted evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), he must consider claimant's 1998 claim on the merits, based on a weighing of all the evidence of record. *See Shupink v. LTV Steel Corp.*, 17 BLR 1-24 (1992).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge