BRB No. 97-1691 BLA

VENANZIO VITALI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CANTERBURY COAL COMPANY	)	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 George P. Morin, Administrative Law Judge, United States Department of Labor.

Venanzio Vitali, Saltsburg, Pennsylvania, *pro se*.

Hillary S. Zakowitz (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (96-BLA-1080) of Administrative Law Judge George P. Morin 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 involves a duplicate claim.[1]

[1] Claimant's first two claims, filed on May 10, 1978 and June 14, 1982, were merged and denied for failure to establish invocation of the interim presumption pursuant to 20 C.F.R. Part 727. Claimant appealed to the Board, which vacated the administrative law judge's findings, held that claimant established invocation, and remanded the case to the administrative law judge to determine whether the evidence established rebuttal of the presumption. *Vitali v. Canterbury Coal Co.*, BRB No. 85-2173 BLA (July 17, 1987)

The administrative law judge credited claimant with twenty-two years of coal mine employment and noted that the withdrawal previously granted by another administrative law judge pertained only to claimant's modification requests on his first claim, and not the claim itself, which had already been decided on the merits. The administrative law judge considered the new evidence to determine whether claimant established a material change in conditions pursuant to 20 C.F.R. §725.309. The administrative law judge found that claimant's new evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied as claimant failed to establish a requisite element of entitlement. On appeal, claimant generally contends that he is entitled to benefits. Employer has responded, urging affirmance of the decision below. The Director, Office of Worker's Compensation Programs has indicated that he will not participate in this appeal.

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

---

(unpub.). Employer requested reconsideration. The Board granted the request, and upon reconsideration, vacated its findings and affirmed the administrative law judge's previous Decision and Order denying benefits for failure to establish invocation of the interim presumption. *Vitali v. Canterbury Coal Co.*, BRB No. 85-2173 BLA (May 18, 1988) (unpub.). Claimant appealed this decision to the Board, which forwarded the claim to the United States Court of Appeals for the Third Circuit. Claimant did not further pursue this appeal. Director's Exhibit 34. Claimant subsequently submitted additional evidence twice. The case was scheduled for a hearing before the administrative law judge, when claimant requested that his claim be withdrawn. Director's Exhibit 34. An administrative law judge issued an order allowing withdrawal of the claim on October 25, 1991. Director's Exhibit 34. Claimant filed the instant claim on February 2, 1995. Director's Exhibit 1.

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).

Initially, we affirm the administrative law judge's determination that the evidence submitted subsequent to the previous denial of benefits does not establish that claimant has pneumoconiosis. The administrative law judge properly determined that claimant could not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) as none of the new x-ray evidence was positive for pneumoconiosis. Decision and Order at 5. The administrative law judge next properly found that claimant could not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) because the record did not contain any autopsy or biopsy evidence. He also correctly determined that none of the presumptions were applicable pursuant to 20 C.F.R. §718.202(a)(3) in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.304, 718.305, 718.306; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

With respect to the medical opinions of record, the administrative law judge acted within his discretion in according diminshed weight to Dr. Malhotra's opinion of pneumoconiosis because he found the opinions of Drs. Pickerill and Altmeyer to be well-reasoned and well-documented in that they relied on objective evidence in arriving at their conclusions that claimant's symptoms were due to his bronchitis and cardiac dyspnea, whereas Dr. Malhotra did not even diagnose these conditions. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The administrative law judge also found that these diagnoses were supported by the opinions of Drs. Krawtz and Hanzel. Director's Exhibits 10, 34; Decision and Order at 7. Lastly, the administrative law judge permissibly considered and accorded weight to Dr. Altmeyer's credentials as board-certified in internal medicine and pulmonary medicine. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Thus, we affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

We must vacate the administrative law judge's denial of the duplicate claim, however, because the administrative law judge failed to consider the new evidence in light of whether a totally disabling respiratory impairment has been established. The United States Court of Appeals for the Third Circuit, wherein jurisdiction of this case arises, has held that if claimant's new probative medical evidence establishes at least one of the elements of entitlement previously adjudicated against him, he has established a material change in conditions pursuant to 20 C.F.R. §725.309 and the entire record must be considered *de novo*. *See Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). Because the record contains evidence, which if credited, establishes that claimant is totally disabled, and claimant's previous claim was denied for failure to establish invocation of the interim

presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. Part 727, we vacate the administrative law judge's denial of claimant's duplicate claim and remand the case for further consideration of the evidence. If, on remand, the administrative law judge determines that claimant has established a material change in conditions pursuant to Section 725.309, he must then consider the merits of the claim. *Swarrow*, *supra*.

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 decision.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge