BRB No. 98-1367 BLA

LEONARD JUSTUS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 8/24/99
	)	
PREECE, McCLANAHAN & BELCHER COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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.

Leonard Justus, Oakwood, Virginia, *pro se*.

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

Helen H. Cox (Henry L. Solano, 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, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (96-BLA-1324) of Administrative Law Judge Mollie W. Neal denying benefits on a duplicate 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). After crediting claimant with four years of coal mine employment, the administrative law judge found that the newly submitted evidence established total disability pursuant to 20 C.F.R. §718.204(c)(1) and (c)(2), and, consequently, a material change in conditions pursuant to 20 C.F.R. §725.309(d).[1] However, the administrative law judge denied benefits because claimant did not establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R.§§718.202(a) and 718.203(b) and total disability due to pneumoconiosis under 20 C.F.R. §718.204(b). On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. Employer further notes, however, that the administrative law judge erred in finding a material change in conditions under Section 725.309(d).[2] The Director, Office of Workers' Compensation Programs (the

[1]Claimant initially filed an application for benefits on September 15, 1986. Director's Exhibit 21. This claim was finally denied by the district director on December 31, 1986, as claimant did not establish any of the elements of entitlement. *Id.* The district director declined to address a request for reconsideration submitted on claimant's behalf in March of 1987 on the ground that claimant did not proffer any additional evidence. *Id.* The district director also informed counsel that claimant had one year from the date of the denial to submit evidence in support of a possible modification of the district director's determination. In a letter dated February 10, 1988, claimant's counsel inquired as to the status of the request for reconsideration and appended a copy of Dr. Robinette's report of his May 14, 1987 examination of claimant. *Id.* The district director referred to his prior response and stated that because more than a year had elapsed since the December 1986 denial, he would not consider Dr. Robinette's report. *Id.* The district director further advised counsel that claimant should file a new application for benefits if he wished to continue pursuing his claim. *Id.* Claimant filed a second claim on July 13, 1994. Director's Exhibit 1.

[2]In its response brief, employer asserts that it should be dismissed as responsible operator because the Department of Labor has not determined

Director), urges the Board to vacate the denial of benefits and remand this case for the administrative law judge to consider all the medical opinion evidence under Section 718.202(a)(4) and, if necessary, under Section 718.204(b).

In an appeal filed by a claimant without the assistance of counsel, the Board will consider 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 supported by substantial evidence, are rational, and are consistent with applicable 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 (1985).

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that in order to establish a material change in conditions pursuant to Section 725.309(d), claimant must establish by a preponderance of the newly submitted evidence at least one of the elements of entitlement that formed the basis for the denial of the prior claim. *See Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *cert. denied*, 117 S.Ct. 763 (1997). Accordingly, in this case, in order to establish a material change in conditions under Section 725.309(d), claimant must establish by a preponderance of the newly submitted evidence any one of the elements of entitlement under Sections 718.202(a) or 718.204(b) and (c).[3]

---

whether Hackney Fuel Company, Incorporated, was the last coal mine operator to employ claimant for at least one year. Further, employer asserts that it has not been established that Old Republic Insurance Company insured employer at the time of claimant's last employment with employer.

[3]Employer argues that it is not clear that claimant failed to establish total disability in his original claim. Employer notes that the box checked on the form

After considering the administrative law judge's Decision and Order and the evidence of record, we vacate the administrative law judge's finding under Section 725.309(d) because she did not properly consider the newly submitted evidence relevant to the issue of total disability. In order to establish total disability under the individual subsections of 718.204(c), claimant must demonstrate, by a preponderance of the like kind evidence, that he is suffering from a totally disabling respiratory or pulmonary impairment. *See* 20 C.F.R. §718.204(c)(1)-(4); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). If the administrative law judge finds total disability established under one of the subsections of Section 718.204(c)(1)-(4), she is then required to weigh the evidence supportive of a finding of total disability against the newly submitted contrary probative evidence. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986).

In the present case, the administrative law judge did not weigh the like kind evidence. She merely noted the presence in the record of a newly submitted qualifying pulmonary function study and blood gas study. Decision and Order at 5-6. In addition, the administrative law judge did not weigh the newly submitted evidence demonstrating total disability against the newly submitted contrary probative evidence. We vacate the administrative law judge's finding that claimant established a material change in condition with respect to the element of total disability, therefore, and remand the case to the administrative law judge for reconsideration of this issue.

---

shows that the Department of Labor (DOL) denied the original claim because the evidence did not demonstrate total disability due to pneumoconiosis. Employer's Brief at 7 n.3. Employer's arguments have no merit. The DOL denied benefits because none of the conditions for entitlement was met. Director's Exhibit 21.

On remand, the administrative law judge must weigh under Section 718.204(c)(1), the nonqualifying pulmonary function study obtained by Dr. Robinette on May 14, 1987, and must address the fact that the three additional newly submitted pulmonary function studies of record, which produced qualifying values, were invalidated by either the administering physician or a reviewing physician. Director's Exhibits 7A, 8, 8A, 9, 21; Employer's Exhibit 1; *see Allen v. Director, OWCP*, 69 F.3d 532, 20 BLR 2-97 (4th Cir. 1995). With respect to Section 718.204(c)(2), the administrative law judge must consider the nonqualifying exercise blood gas study obtained by Dr. Forehand on September 2, 1994, in conjunction with the qualifying study obtained by Dr. Forehand on the same date, and the qualifying tests performed by Drs. Robinette and Hippensteel on May 14, 1987 and July 23, 1997, respectively. Director's Exhibits 7, 7A, 21; Employer's Exhibit 1. Regarding Section 718.204(c)(4), the administrative law judge is required to weigh the conflicting medical opinions of Drs. Forehand, Robinette, and Hippensteel. Director's Exhibits 9, 21; Employer's Exhibit 1. In addition, contrary to the administrative law judge's apparent finding under Section 718.202(a)(4), Dr. Robinette's report of his May 14, 1987 examination of claimant constitutes newly submitted evidence inasmuch as it was developed subsequent to the December 1986 denial of claimant's initial claim. Decision and Order at 5, 8; Director's Exhibit 21; *see Rutter*, *supra*. Thus, the administrative law judge should have treated Dr. Robinette's report and the objective studies obtained on that day as newly submitted evidence.[4] Director's Exhibit 21.

If the administrative law judge finds that total disability has been demonstrated under one of the subsections of Section 718.204(c) based upon her weighing of the newly submitted like kind evidence, she must weigh all of newly submitted like and unlike evidence under Section 718.204(c) to determine whether the evidence supportive of a finding of total disability outweighs the contrary probative evidence. *See Shedlock*, *supra*. If the administrative law judge so finds, then claimant has established a material change in conditions pursuant to Section 725.309(d). *See Rutter*, *supra*.

Should the administrative law judge determine that claimant has not established a material change in conditions with respect to the element of total

[4]With respect to proof of total disability under 20 C.F.R. §718.204(c)(3), we note that the record does not contain any evidence supportive of a finding of cor pulmonale with right sided congestive heart failure.

disability under Section 718.204(c), claimant still has the opportunity to establish a material change in conditions with respect to the element of the existence of pneumoconiosis pursuant to Section 718.202(a), inasmuch as his initial claim was denied because he did not prove any of the elements of entitlement. Director's Exhibit 21; *see Rutter*, *supra*. As indicated *infra*, however, the administrative law judge properly determined that the newly submitted evidence does not support a finding of pneumoconiosis under Section 718.202(a)(1)-(3). With respect to Section 718.202(a)(4), the administrative law judge correctly found that the newly submitted medical opinions authored by Drs. Forehand and Hippensteel are insufficient to establish the existence of pneumoconiosis, as neither physician diagnosed pneumoconiosis or any other coal dust related lung disease. Decision and Order at 8; Director's Exhibit 9; Employer's Exhibit 1. Nevertheless, in light of the fact that the administrative law judge did not include Dr. Robinette's report of his May 14, 1987 examination of claimant in her consideration of the newly submitted evidence pursuant to Section 718.202(a)(4), the possibility that the newly submitted medical opinions support a finding of pneumoconiosis has not been foreclosed. Accordingly, if the administrative law judge determines on remand that claimant has not established a material change in conditions with respect to the element of total disability, she should consider whether claimant has established a material change in conditions with respect to the existence of pneumoconiosis under Section 718.202(a)(4).

Turning to the administrative law judge's findings on the merits, we conclude that substantial evidence supports the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(3). Although the administrative law judge only considered the newly submitted x-ray interpretations, all of the x-ray interpretations of record are negative for pneumoconiosis. Therefore, the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Decision and Order at 7; Director's Exhibits 11, 13, 21; Employer's Exhibit 2. Also, since the record contains no biopsy evidence in this living miner's claim, the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(2). Decision and Order at 7. Likewise, since there is no evidence of complicated pneumoconiosis, *see* 20 C.F.R. §718.304, and the presumptions contained in 20 C.F.R. §§718.305 and 718.306 are inapplicable in this living miner's claim filed after January 1, 1982, *see* 20 C.F.R. §718.305(e); Director's Exhibit 1, the administrative law judge properly found that the existence of pneumoconiosis is not established pursuant to Section 718.202(a)(3).

However, we cannot affirm the administrative law judge's findings on the merits under Sections 718.202(a)(4) and 718.204(b). If a claimant establishes a material change in conditions under Section 725.309(d), the administrative law judge is required to review the entire record to determine whether entitlement to benefits on the merits has been demonstrated. *See Rutter*, *supra*. In the instant case, the administrative law judge limited her analysis to a review of the evidence she believed had been submitted since the prior denial. Decision and Order at 8, 9; Director's Exhibit 9; Employer's Exhibit 1. We, therefore, vacate the administrative law judge's findings under Sections 718.202(a)(4) and 718.204(b) and remand the case to the administrative law judge for reconsideration of entitlement based upon a consideration of all of the evidence of record, if she determines that claimant has established a material change in conditions pursuant to Section 725.309(d).

If the merits of entitlement are reached on remand, the medical report evidence submitted with the prior claim, namely the opinion of Dr. Paranthaman, Director's Exhibit 21, must be weighed under Section 718.202(a)(4) with the newly submitted medical opinions of Drs. Robinette, Forehand and Hippensteel.[5] If, on

[5]In its response brief, employer argues that remand is not necessary because the opinions of Drs. Paranthaman and Robinette are too speculative to support a finding of pneumoconiosis. Employer's Brief at 8, n.4. We hold that this is a determination for the administrative law judge. If, on remand, the administrative law judge finds that claimant has established a material change in conditions, she must review the entire record to ascertain whether claimant has established entitlement to benefits on the merits with reliable, probative, and substantial evidence. Administrative Procedure Act, 5 U.S.C. §556(d), as incorporated into the Act by 5 U.S.C. 554, 33 U.S.C. §919(d) and 30 U.S.C. §9322(a); *see United States Steel Mining Co. v. Director, OWCP [Jarrell]*, 1999 WL 547931 (4th Cir., July 28, 1999); *see also Piney Mountain Coal Co. v. Mays,* 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999). Employer also argues that none of the evidence submitted in connection with the prior claim has any bearing on whether claimant developed pneumoconiosis after the DOL denied the claim because claimant did not establish the existence of pneumoconiosis in the prior claim. Employer further argues that the DOL's final determination would be rendered "worthless" if the administrative law judge were allowed to revisit evidence submitted in the original record and somehow find that it established pneumoconiosis despite unanimous new evidence to the contrary. We reject employer's arguments. In the event that the administrative law judge finds that claimant has established total disability or the existence of pneumoconiosis on the basis of the newly submitted evidence and, therefore, a material change in conditions, she must then determine whether all of the record evidence, including that submitted with the previous claim,

remand, the administrative law judge finds that claimant has established the existence of pneumoconiosis, she must then reweigh all of the evidence of record under Section 718.204(c)(1)-(4) together, like and unlike, in determining whether claimant has established a totally disabling respiratory or pulmonary impairment at Section 718.204(c). *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); *Shedlock, supra*. If total disability is established pursuant to Section 718.204(c), then the administrative law judge must weigh all the relevant evidence regarding disability causation under Section 718.204(b), and determine whether claimant has established by a preponderance of the evidence that pneumoconiosis is at least a contributing cause of his totally disabling respiratory impairment. *See Robinson v. Pickands Mather & Co.,* 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).[6]

---

supports a finding of entitlement to benefits. *See Lisa Lee Mines v. Director, OWCP [Rutter],* 86 F.3d 1358, 20 BLR 2-227(4th Cir. 1996)(*en banc), cert. denied*, 117 S.Ct. 763 (1997); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1996)(*en banc)*.

[6]With regard to employer' assertion that employer and carrier should be dismissed, *see* n.1, *supra*, the administrative law judge did not address this issue in her Decision and Order, inasmuch as she denied benefits. The administrative law judge is instructed to address employer's arguments if the responsible operator issue is reached on remand.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge