BRB No. 98-1431 BLA

ORRIS GRIFFITH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 8/14/99
	)	
HARMAN MINING CORPORATION	)	
	)	
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 Denying Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Orris Griffith, Mouthcard, Kentucky, *pro se*.

Gregory S. Feder (Arter & Hadden LLP), Washington, D.C., for employer/carrier.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order Denying Benefits (98-BLA-0007) 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). This case involves a duplicate claim filed on September 16, 1996.[1] In his Decision and Order dated July 24, 1998, the

[1]Claimant filed a previous claim on March 9, 1983. Director's Exhibit 45. After a hearing was held before Administrative Law Judge W. Ralph Musgrove on June 17, 1986,

administrative law judge determined that the evidence associated with claimant's duplicate claim was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). The administrative law judge found, therefore, that claimant failed to establish a material change in conditions under 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 decision denying benefits. The Director, Office of Workers' Compensation Programs, has filed a

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Judge Musgrove issued a Decision and Order denying benefits. *Id*. In his Decision and Order, dated January 6, 1987, Judge Musgrove credited claimant with forty years of coal mine employment, and determined that claimant established the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4). *Id*. Judge Musgrove further found that claimant was entitled to the presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that the evidence was insufficient to rebut this presumption. *Id*. Judge Musgrove also determined, however, that claimant failed to establish total disability under 20 C.F.R. §718.204(c) and, accordingly, denied benefits. *Id*. Claimant appealed. *Id*. The Board affirmed Judge Musgrove's finding that claimant failed to establish total disability under Section 718.204(c), and thus affirmed the denial of benefits. *Griffith v. Harman Mining Corp.*, BRB No. 87-0393 BLA (Sep. 26, 1988)(unpublished).

Subsequently, on June 22, 1989 and July 5, 1989, claimant filed with the district director requests for modification of the denial of benefits. Director's Exhibit 45. The district director denied modification, and referred the case to the Office of Administrative Law Judges (OALJ). *Id*. The parties filed with the OALJ a joint motion for a decision on the record, thereby waiving a hearing. *Id*. In a Decision and Order dated August 27, 1993, Administrative Law Judge J. Michael O'Neill stated that he reviewed all of the evidence of record, and found that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *Id*. Judge O'Neill further found that the evidence of record was insufficient to establish total disability under Section 718.204(c). *Id.* Judge O'Neill, therefore, found that claimant failed to establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310, and denied benefits. *Id*. By letter dated October 12, 1993, claimant forwarded to the district director a medical report from Dr. Wells, dated September 29, 1993. *Id.* In a letter dated October 26, 1993, the district director informed claimant that the district director did not at that time have jurisdiction over the claim, since the claim had been referred to Judge O'Neill, and the record file had not been transferred back to the district director's office. *Id*. The district director advised claimant to correspond with the OALJ, but notified claimant that he (the district director) retained a copy of Dr. Wells's report for his records. *Id*. The record reflects that claimant took no further action in pursuit of benefits until filing the instant duplicate claim on September 16, 1996. Director's Exhibit 1. A hearing was held before the administrative law judge on April 7, 1998, at which Dr. Wells's report, together with all of the previously submitted evidence, was admitted into the record at Director's Exhibit 45.

letter indicating he does not intend to participate presently in the proceedings on 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 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 order to establish entitlement to benefits under Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Section 725.309 provides that a duplicate claim is subject to automatic denial on the basis of the prior denial unless there is a determination of a material change in conditions since the denial of the prior claim. 20 C.F.R. §725.309. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, has held in *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.2d 402, 19 BLR 2-223 (4th Cir. 1995), that in addressing whether the material change in conditions requirement of Section 725.309(d) has been satisfied, 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. *See also 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. 1994). In the instant case, the administrative law judge properly noted that the previous claim was finally denied, by Administrative Law Judge J. Michael O'Neill in the prior Decision and Order dated August 27, 1993, on the basis that claimant failed to establish total disability due to pneumoconiosis under Section 718.204. Decision and Order at 6-7. Consequently, the administrative law judge considered whether the newly submitted evidence was sufficient to establish total disability pursuant to Section 718.204(c)(1)-(4).

The administrative law judge's finding that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) in this case is supported by substantial evidence. The administrative law judge properly found that three of the four newly submitted pulmonary function studies, as well as both of the newly submitted arterial blood gas studies of record, were non-qualifying for total disability.[2]

[2]A "qualifying" pulmonary function study or arterial blood gas study yields values

Decision and Order at 8-9; Director's Exhibits 15, 17, 36, 41, 45. We, therefore, affirm the administrative law judge's findings that claimant did not establish total disability pursuant to Section 718.204(c)(1) or (c)(2) as supported by substantial evidence. *See* 20 C.F.R. §718.204(c)(1), (2); *Gray v. Director, OWCP*, 943 F.2d 512, 15 BLR 2-216 (4th Cir. 1991). Additionally, the administrative law judge properly found that claimant did not present evidence of cor pulmonale with right sided congestive heart failure. Decision and Order at 9. We, therefore, affirm the administrative law judge's finding that claimant did not establish total disability under Section 718.204(c)(3). *See* 20 C.F.R. §718.204(c)(3).

In considering the new medical opinions under Section 718.204(c)(4), the administrative law judge correctly stated that Drs. Wells and Musgrave opined that claimant is totally disabled due to pneumoconiosis. Decision and Order at 9-11; Director's Exhibits 39, 45. The administrative law judge further correctly stated that, in contrast, Drs. Fritzhand, Dahhan and Hippensteel concluded that claimant was not totally disabled from a pulmonary or respiratory standpoint. Decision and Order at 10-11; Director's Exhibits 16, 36; Employer's Exhibits 1, 2. The administrative law judge properly credited the opinions of Drs. Fritzhand, Dahhan and Hippensteel on the basis that they were well-reasoned and documented. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); Decision and Order at 11; Director's Exhibits 16, 36; Employer's Exhibits 1, 2. In reaching this conclusion, the administrative law judge found that Drs. Dahhan and Hippensteel reviewed the medical evidence of record, thereby providing them with the broadest base of information upon which to draw their conclusions. Decision and Order at 11; Employer's Exhibits 1, 2. The administrative law judge further found that the opinions of Drs. Dahhan, Hippensteel and Fritzhand were supported by the pulmonary function studies and arterial blood gas studies associated with the duplicate claim. Decision and Order at 11; Director's Exhibits 15-17, 36, 41; Employer's Exhibits 1, 2.

In discounting the opinions of Drs. Wells and Musgrave, the administrative law judge found that these opinions were not well-reasoned or documented because Dr. Wells considered a smoking history which was less than half of the twenty-one year smoking history to which claimant testified at his hearing, and Dr. Musgrave evidently assumed that claimant had no smoking history at all, noting only that claimant was a non-smoker. Decision and Order at 11; Director's Exhibits 39, 45; 1998 Hearing Transcript at 20. The administrative law judge also discredited the opinions of Drs. Wells and Musgrave under Section 718.204(c) because neither doctor considered an arterial blood gas study. Decision and Order at 11. Any error the administrative law judge made in discrediting the reports of Drs. Wells and Musgrave is harmless as the administrative law judge properly credited the contrary opinions of Drs. Dahhan, Hippensteel and Fritzhand for the reasons

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which are equal to or less than the applicable table values set forth in Appendices B and C of Part 718. *See* 20 C.F.R. §718.204(c)(1) and (c)(2). A "non-qualifying" test yields values which exceed the requisite table values.

discussed *supra*, and further properly accorded greatest weight to the opinions of Drs. Dahhan and Hippensteel in particular because these physicians possess greater expertise in the area of pulmonary disease.[3] *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-1276 (1984); Decision and Order at 11; Employer's Exhibits 1, 2. We, therefore, affirm the administrative law judge's finding that the newly submitted medical opinion evidence was insufficient to establish total disability under Section 718.204(c)(4).

Inasmuch as the administrative law judge properly found that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4), the element of entitlement previously adjudicated against claimant, we affirm the administrative law judge's finding that claimant failed to establish a material change in conditions under Section 725.309. *See Rutter, supra; see also Ross, supra*.

[3]The administrative law judge correctly found that Drs. Dahhan and Hippensteel are Board-certified in internal medicine with a subspecialty in pulmonary diseases. Decision and Order at 10-11; Employer's Exhibits 1, 2. The record does not reflect that Drs. Wells and Musgrave possess similar qualifications.

Accordingly, the administrative law judge's Decision and Order Denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge