BRB No. 98-1455 BLA

JAMES B. HAYES Claimant-Petitioner v. TURNER ELKHORN MINING, INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 8/10/99 DECISION AND ORDER

Appeal of the Decision and Order - Denying Benefits of J. Michael O'Neill, Administrative Law Judge, United States Department of Labor.

James B. Hayes, Drift, Kentucky, *pro se*.

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

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appears without the assistance of counsel and appeals from the administrative law judge's Decision and Order - Denying Benefits (96-BLA-1299) with respect to 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 relevant procedural history of this case is as follows: Claimant filed a claim for benefits on June 23, 1973 with the Social Security Administration (SSA). Following denial by SSA on the ground that claimant did not establish any of the elements of entitlement, claimant elected review by the Department of Labor. The district director denied entitlement on September 28, 1979, as claimant did not prove any of the elements of entitlement. Director's Exhibit 51. The district director informed claimant that he should submit additional evidence in the form of a new pulmonary evaluation. *Id.*. Claimant responded that he was physically incapable of appearing for any additional medical examinations. *Id.*.

Claimant filed a second application for benefits which was dated May 5, 1980, but stamped as received in the district director's office on August 18, 1980. Director's Exhibit 51. On May 14, 1980, the district director issued a letter in which claimant was informed that his claim was denied on the ground that he failed to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. *Id.*. Claimant requested a hearing in a letter dated May 19, 1980. *Id.*. Following the submission of evidence by the designated responsible operator, the district director instructed claimant to schedule a physical examination with Dr. Sutherland. Claimant responded that he was too disabled to submit to such an examination. *Id.*. The district director then issued an Order to Show Cause in which he stated that before the claim could be referred to the Office of Administrative Law Judges (OALJ) for a hearing, a current pulmonary evaluation was needed in order to document claimant's condition. Accordingly, the district director instructed claimant to show cause why his claim should not be denied due to claimant's failure to submit to a medical examination. *Id.*. Finding claimant's response to his order unsatisfactory, the district director determined that the claim should be dismissed pursuant to 20 C.F.R. §725.409. The case was then referred to the OALJ for a hearing. In a Decision and Order issued on March 22, 1988, Administrative Law Judge Frank H. Itkin dismissed the claim based upon claimant's refusal to submit to a complete pulmonary evaluation. *Id.*. Claimant filed an appeal with the Board, which affirmed the dismissal of claimant's application for benefits in a Decision and Order issued on May 31, 1990. *Hayes v. Director, OWCP*, BRB No. 88-1231 BLA (May 31, 1990)(unpub.). Claimant then filed a claim on March 23, 1992. Director's Exhibit 1.

Following the district director's initial determination that claimant was not entitled to benefits, the case was transferred to the OALJ for a hearing. After the case was remanded to the district director in response to claimant's request and a hearing was continued at claimant's request, the case was assigned to Administrative Law Judge J. Michael O'Neill (the administrative law judge). In a letter dated March 19, 1997, claimant's lay representative asked that the administrative law judge decide the case

based upon a review of the evidence of record.[1] Inasmuch as employer and the Director, Office of Workers' Compensation Programs (the Director), had no objection, the administrative law judge granted claimant's request. In a Decision and Order issued on August 4, 1998, the administrative law judge noted that claimant's March 1992 application for benefits was a duplicate claim under the terms of 20 C.F.R. §725.309. The administrative law judge indicated that his consideration of whether claimant established a material change in conditions under Section 725.309 was governed by the standard that the United States Court of Appeals for the Sixth Circuit adopted in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).[2] The administrative law judge determined that the newly submitted evidence did not support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). The administrative law judge concluded, therefore, that claimant failed to establish a material change in conditions under Section 725.309 and denied benefits accordingly.[3] Claimant's appeal followed. Employer has responded and urges affirmance of the denial of benefits. The Director has not filed a brief in this appeal.

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[1]Although a lay representative assisted claimant in the pursuit of his claim before the district director and the administrative law judge, claimant has appeared without the lay representative's assistance or the assistance of counsel in the present appeal.

[2]In *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), the United States Court of Appeals for the Sixth Circuit held that in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309, a claimant must prove at least one of the elements of entitlement previously adjudicated against him.

[3]Inasmuch as claimant's 1973 claim was still pending when he filed a second application for benefits in 1980, the 1980 claim merged into the 1973 claim. 20 C.F.R. §725.309(c). For the purposes of assessing whether claimant established a material change in conditions under Section 725.309(d), the administrative law judge properly

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

We hereby affirm the administrative law judge's determination that the newly submitted evidence of record does not support a finding of pneumoconiosis or total disability, as it is rational and supported by substantial evidence. With respect to Section 718.202(a)(1), the administrative law judge considered the x-ray dated April 24, 1992 and acted within his discretion in finding that the six interpretations of this film did not establish, by a preponderance of the evidence, that this x-ray was positive for pneumoconiosis, as the four physicians who were dually qualified as B readers and Board-certified radiologists were evenly split as to whether the film was positive for pneumoconiosis. Decision and Order at 8; Director's Exhibits 13, 16-18, 49; *see Director, OWCP v. Greenwich Collieries [Ondecko],* 114 S.Ct. 2251, 18 BLR 2A-1 (1994); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). The administrative law judge properly determined that the films obtained on June 3, 1992, July 28, 1992, and October 2, 1992, did not support a finding of pneumoconiosis on the ground that all of the interpretations of these x-rays were negative for pneumoconiosis. Decision and Order at 8; Director's Exhibits 11, 12, 14, 15, 38, 39, 44, 46-48. With respect to the film dated June 7, 1994, the administrative law judge acted within his discretion in determining that it did not support a finding of pneumoconiosis, inasmuch as the preponderance of the readings by dually qualified physicians was negative. Decision and Order at 8; Director's Exhibits 63-66, 71A, 72; *see Ondecko*, *supra*; *Dixon*, *supra*. The administrative law judge properly found that the x-ray dated December 15, 1995 was insufficient to establish the existence of pneumoconiosis, as the sole interpretation of this film was negative. Decision and Order at 8; Director's Exhibit 86. The administrative law judge rationally concluded, therefore, that the newly submitted x-rays do not support a finding of pneumoconiosis pursuant to Section 718.202(a)(1).

Regarding Section 718.202(a)(2) and (3), the administrative law judge determined correctly that claimant cannot establish the existence of pneumoconiosis under these

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determined that all of the elements of entitlement had previously been adjudicated against claimant. *See* Director's Exhibit 51; 20 C.F.R. §§725.309(d), 725.466(a); *Ross*, *supra*.

subsections, as the record does not contain any biopsy evidence and the relevant claim was filed by a living miner after January 1, 1982. Decision and Order at 8; *see* 20 C.F.R. §§718.202(a)(2), 718.202(a)(3), 718.304-306.

Turning to Section 718.202(a)(4), the administrative law judge considered the newly submitted medical opinions of Drs. Sundaram, Varney, Dahhan, Broudy, and Fino. The administrative law judge indicated accurately that Dr. Sundaram diagnosed pneumoconiosis while Drs. Varney, Dahhan, Broudy, and Fino concluded that claimant is not suffering from the disease. Decision and Order at 11; Director's Exhibits 9, 38-40, 63; Employer's Exhibits 1, 2. The administrative law judge acted within his discretion in according greater weight to the opinions of Drs. Varney, Dahhan, Broudy, and Fino on the ground that their diagnoses are better supported by the objective evidence of record. Decision and Order at 11; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The administrative law judge also rationally determined that the opinions of Drs. Dahhan, Broudy, and Fino are entitled to more weight based upon their qualifications as physicians who are Board-certified in Internal Medicine and Pulmonary Disease.[4] Decision and Order at 11; *see Clark*, *supra*; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). Moreover, the administrative law judge permissibly accorded additional weight to the opinions of Drs. Broudy and Fino, as they had the opportunity to review medical evidence dating from 1993 to 1997 and, therefore, had a broad base of information upon which to base their conclusions and a four year period over which to gauge any change in claimant's condition. Decision and Order at 11; *see Clark*, *supra*; *King*, *supra*; *Wetzel*, *supra*. The administrative law judge rationally concluded, therefore, that the newly submitted medical opinions do not support a finding of pneumoconiosis pursuant to Section 718.202(a)(4).

With respect to the issue of total disability, the administrative law judge determined correctly that the newly submitted pulmonary function studies and blood gas studies do not demonstrate the presence of a totally disabling respiratory or pulmonary impairment under Section 718.204(c)(1) and (c)(2), as none of the studies produced qualifying values.[5] Decision and Order at 11; Director's Exhibits 8, 10, 38, 39, 63. The administrative law judge also determined correctly that total disability was not established under Section 718.204(c)(3), as the record did not contain any evidence that claimant is suffering from cor pulmonale with right sided congestive heart failure. Decision and Order at 11; 20 C.F.R. §718.204(c)(3).

[4]There is no evidence in the record indicating that Dr. Sundaram is similarly qualified.

[5]A "qualifying" pulmonary function study or blood gas study is one that produces values equal to or less than the values set forth in the tables appearing in Appendix B and Appendix C to 20 C.F.R. Part 718. A "nonqualifying" study is one that produces values in excess of the table values.

Concerning Section 718.204(c)(4), the administrative law judge rationally concluded that the opinions in which Drs. Varney, Dahhan, Broudy, and Fino stated that claimant is not suffering from any respiratory or pulmonary impairment are entitled to more weight than Dr. Sundaram's contrary opinion, as they are better supported by the objective evidence of record. Decision and Order at 12; Director's Exhibits 9, 38-40, 63; Employer's Exhibits 1, 2; *see Clark*, *supra*; *King*, *supra*; *Wetzel*, *supra*. In addition, the administrative law judge acted within his discretion in according greater weight to the opinions of Drs. Dahhan, Broudy, and Fino based upon their superior qualifications. *See Clark*, *supra*; *McMath*, *supra*. The administrative law judge permissibly determined, therefore, that the newly submitted medical opinions are insufficient to establish total disability pursuant to Section 718.204(c)(4).

Inasmuch as the administrative law judge rationally determined that the newly submitted evidence do not support a finding of pneumoconiosis under Section 718.202(a)(1)-(4) or total disability under 718.204(c)(1)-(4), the elements of entitlement previously adjudicated against claimant, we affirm his finding that claimant did not establish a material change in conditions pursuant to Section 725.309. *See Ross*, *supra*.

Accordingly, the Decision and Order - Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge