BRB No. 04-0355 BLA

DANIEL BESEDICH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 12/28/2004
	)	
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 Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Daniel Besedich, Farmington, West Virginia, *pro se*.

Ashley M. Harman and William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia for employer.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (03-BLA-5384) denying benefits of Administrative Law Judge Fletcher E. Campbell, 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).[1] Claimant filed the instant subsequent claim on January 28, 2002.[2] Director's Exhibit 5. The district director issued a Proposed Decision and Order Denying Benefits on September 30, 2002. Director's Exhibit 34. Claimant requested a hearing, which was held on September 30, 2002 before Judge Campbell (the administrative law judge). In his Decision and Order, the administrative law judge noted that claimant had not filed a pre-hearing report. The administrative law judge then designated certain portions of the exhibits of the Director, Office of Workers' Compensation Programs (the Director) and the employer as the evidence in support of claimant's affirmative case pursuant to 20 C.F.R. §725.414. Decision and Order at 2, n. 1; *see also* Decision and Order at 2-6. After admitting into the record the documentary submissions he designated on behalf of claimant as well as submissions designated by employer, the administrative law judge specifically stated, "Pursuant to 20 C.F.R. [§]725.414(a), I must and hereby do strike all other medical evidence of record." Decision and Order at 6. As to the merits of the case, the administrative law judge found, based on the admitted evidence, that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202 or total pulmonary or respiratory disability pursuant to 20 C.F.R. §718.204(b).[3] Accordingly, the administrative law judge denied benefits.

Employer responds to claimant's appeal, arguing in support of the administrative law judge's denial of benefits. The Director responds, urging the Board to affirm the administrative law judge's denial of benefits on alternative grounds. The Director argues

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[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant filed four prior claims for benefits on October 3, 1991, March 6, 1992, April 5, 1996 and September 3, 1997, respectively. Director's Exhibits 1-3. Each claim was denied by the district director. *Id*. With respect to the most recent prior claim filed on September 3, 1997, the district director determined that claimant established the existence of pneumoconiosis but failed to prove that he was totally disabled by a pulmonary or respiratory impairment. Director's Exhibit 3. Claimant took no further action on that claim following the denial of benefits. *Id.* He next filed the instant subsequent claim on January 28, 2002. Director's Exhibit 5.

[3] The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c).

that the administrative law judge erred in excluding "almost all of the medical evidence from [claimant's] three prior claims, and results of the complete pulmonary evaluation provided to [claimant] by the Department of Labor pursuant to its obligation under Section 413(b) of the Black Lung Benefits Act." Director's brief at 2. The Director further contends that the administrative law judge erred by failing to consider this subsequent claim in accordance with 20 C.F.R. §725.309(d). Director's Brief at 1. However, the Director maintains that these errors were harmless as the evidence fails to establish, as a matter of law, that claimant is totally disabled, and therefore his subsequent claim must be denied on the same basis as the denial of his prior claim pursuant to 20 C.F.R. §725.309(d). Director's Brief at 3.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised 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 this case, the Director correctly points out that the administrative law judge erred by failing to consider claimant's subsequent claim pursuant to 20 C.F.R. §725.309, and also by excluding from the record the new evidence developed in conjunction with this claim. Initially, we note that claimant's prior claim was denied because he failed to establish that he was totally disabled due to pneumoconiosis.[4] *See* 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986); Director's Exhibit 3. The regulation at 20 C.F.R. §725.309(d) provides that a subsequent claim must be denied on the grounds of the prior denial of benefits unless claimant is able to establish a change in one of the applicable conditions of entitlement since the prior denial. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Fourth Circuit has held that, in a case involving the prior regulations, in order to determine whether a material change in conditions was established under 20 C.F.R. §725.309(d) (2000), the administrative law judge must consider all of the newly submitted evidence and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him. *See Lisa*

[4] In a Memorandum of Conference and Stipulation of Uncontested and Contested Issues dated July 22, 1998, the district director denied benefits, finding that while claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202, he was not totally disabled by a pulmonary or respiratory impairment pursuant to 20 C.F.R. §718.204(c) (2000). Director's Exhibit 3. Claimant did not contest the district director's denial of benefits and therefore his claim was administratively closed. *Id*.

Lee Mines v. Director, OWCP [Rutter], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).[5] If claimant proves that one element, then he has demonstrated, as a matter of law, a material change in conditions and the administrative law judge must then consider whether all of the evidence of record, including the evidence submitted with claimant's prior claim, supports a finding of entitlement to benefits. *Id*. Thus, in accordance with 20 C.F.R. §725.309(d), the administrative law judge was required to first consider only the new evidence presented with this subsequent claim to determine whether that evidence was sufficient to establish that claimant was totally disabled by a pulmonary or respiratory impairment.

The administrative law judge did not consider claimant's new evidence, contrary to the requirements of 20 C.F.R. §725.309(d). Rather, he made designations from the prior evidentiary record, which he felt were favorable to claimant, to be evidence in support of claimant's affirmative case, and then excluded all of the remaining evidence of record, which included all of the new evidence developed by the Department of Labor and new evidence submitted by claimant relevant to the analysis of this subsequent claim at 20 C.F.R. §725.309(d). The new evidence excluded by administrative law judge included: 1) a Department of Labor pulmonary evaluation provided to claimant on April 17, 2002 by Dr. Prasan V. Devabhaktuni,[6] Director's Exhibit 24; 2) a two-sentence letter dated October 17, 2002 from Dr. Philip H. Horner, indicating that he was treating claimant for chronic obstructive pulmonary disease (COPD), among other conditions, Director's Exhibit 35; and 3) a September 3, 2002 letter from Dr. Warren T. Anderson, which outlined claimant's treatment for heart disease, Director's Exhibit 35.[7]

The Director correctly points out that claimant's new evidence, which included the reports from Drs. Horner and Anderson, should have been admitted as part of his affirmative case pursuant to 20 C.F.R. §725.414. *See* 20 C.F.R. §725.414(a)(2)(i). Furthermore, there was no basis for the administrative law judge to exclude Dr. Devabhaktuni's report as the results of the complete pulmonary evaluation provided by

[5] Because claimant's last coal mine employment occurred in West Virginia, this claim arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 7.

[6] Dr. Devabhaktuni's examination included an x-ray as well as pulmonary function and arterial blood gas testing. He opined in his May 20, 2002 report that claimant had no pulmonary impairment due to pulmonary disease. Director's Exhibits 24-28.

[7] Neither Dr. Horner nor Dr. Anderson addressed whether claimant had a totally disabling pulmonary or respiratory impairment. Director's Exhibit 35.

the Director pursuant to Section 413 of the Act, are not subject to the evidentiary limitations. *See* 20 C.F.R. §725.406(b). Similarly, the evidence from claimant's prior claims is not subject to the limitations of Section 725.414. *See* 20 C.F.R. §725.309(d)(1).[8]

Although the administrative law judge erred by excluding the foregoing new evidence and by failing to consider claimant's subsequent claim pursuant to 20 C.F.R. §725.309(d), we are compelled to hold as harmless the administrative law judge's errors, s*ee Johnson v. Jeddo-Heghland Coal Co*., 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Matney v. J & L Coal Co.*, 3 BLR 1-332 (1981), as the new evidence is insufficient, as a matter of law, to establish that claimant is totally disabled and therefore that there has been a change in one applicable condition of entitlement since the denial of his prior claim. First, we note that that none of the new pulmonary function or arterial blood gas study evidence is qualifying[9] for total disability; therefore, claimant cannot establish a totally disabling pulmonary or respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i) or (ii). *See* Director's Exhibits 25, 26. Secondly, since there is no evidence stating that claimant suffers from cor pulmonale with right-sided congestive heart failure, claimant cannot establish a totally disabling pulmonary or respiratory impairment at 20 C.F.R. §718.204(b)(2)(iii). Finally, none of the new medical reports indicate that claimant is disabled by a pulmonary or respiratory impairment. *See* Director's Exhibits 24, 35; Employer's Exhibit 3. Claimant therefore cannot establish that he has a totally disabling pulmonary or respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Because the new evidence fails to establish, as a matter of law, that claimant is totally disabled by a pulmonary or respiratory impairment pursuant to 20 C.F.R. §718.204(b), claimant cannot establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Because the evidence does not meet the requirements

[8] Assuming that claimant is able to establish a change in an applicable condition of entitlement under 20 C.F.R §725.309(d), *i.e.*, total pulmonary or respiratory disability, all of the evidence from the prior claims would be considered in determining whether claimant established his entitlement to benefits on the merits of this claim. *See Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

[9] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values found in Appendices B and C of 20 C.F.R. Part 718. *See* 20 C.F.R. §718.204(b)(2)(i) and (ii). A "non-qualifying test" produces results that exceed the table values.

of 20 C.F.R. §725.309, we affirm the administrative law judge's denial of this subsequent claim for benefits.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge