BRB No. 01-0608 BLA

COOLIDGE FUGATE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
U.S. STEEL MINING 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 John C. Holmes, Administrative Law Judge, United States Department of Labor.

Coolidge Fugate, Raysal, West Virginia, *pro se*.[1]

Howard G. Salisbury, Jr. (Kay Castro & Chaney PLLC), Charleston, West Virginia, for employer.

Helen H. Cox (Eugene Scalia, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

[1]Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested on behalf of claimant that the Board review the administrative law judge's decision. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order (00-BLA-1039) of Administrative Law Judge John C. Holmes 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).[2] The instant case involves a duplicate claim filed on

[2]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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive

November 2, 1995.[3] In the initial decision, Administrative Law Judge Stuart A. Levin found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis or total disability. Judge Levin, therefore, found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309

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relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[3]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on May 11, 1983. Director's Exhibit 22. In a Decision and Order dated August 11, 1988, Administrative Law Judge Robert L. Cox found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). *Id.* Accordingly, Judge Cox denied benefits. *Id.* There is no indication that claimant took any further action in regard to his 1983 claim.

Claimant filed a second claim on November 2, 1995. Director's Exhibit 1.

(2000). Accordingly, Judge Levin denied benefits.

Claimant subsequently requested modification of his denied claim. Administrative Law Judge John C. Holmes (the administrative law judge) found that the evidence was insufficient to establish the existence of pneumoconiosis. The administrative law judge also found that the evidence was insufficient to establish total disability. 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 denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, noting his belief that the instant case is not affected by any of the revisions to the regulations.

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 20 C.F.R. 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*).

The administrative law judge considered claimant's 1995 claim on the merits. Before adjudicating claimant's 1995 claim on the merits, the administrative law judge should have initially addressed whether the evidence was sufficient to establish modification pursuant to 20 C.F.R. §725.310 (2000).[4] *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac*

[4]The Board has held that in considering whether a claimant has established a change in conditions pursuant to 20 C.F.R. §725.310 (2000), an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). In the prior decision, Judge Levin denied benefits because claimant failed to

v. BCNR Mining Corp., 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). Had the administrative law judge found that evidence sufficient to establish modification pursuant to 20 C.F..R. §725.310 (2000), he should have also addressed whether the evidence submitted since the denial of claimant's 1983 claim was sufficient to establish a material

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establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Consequently, the issue properly before Administrative law Judge John C. Holmes (the administrative law judge) was whether the newly submitted evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).

Modification may also be based upon a finding of a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).

Although Section 725.310 has been revised, these revisions only apply to claims filed after January 19, 2001.

change in conditions pursuant to 20 C.F.R. §725.309 (2000).[5] However, to the extent that the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis may be affirmed, *see* discussion, *infra*, the administrative law judge's failure to make initial findings pursuant to 20 C.F.R. §§725.310 (2000) and 725.309 (2000) constitutes harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1284 (1986).

[5]Section 725.309 (2000) 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(d) (2000). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that in assessing whether a material change in conditions has been established, 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. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1995), *cert. denied*, 117 S.Ct. 763 (1997). Claimant's 1983 claim was denied because claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 22. Consequently, in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), the newly submitted evidence must support a finding of pneumoconiosis.

Although Section 725.309 has been revised, these revisions only apply to claims filed after January 19, 2001.

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises,[6] has held that although Section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a miner suffers from the disease. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *see also Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). While the administrative law judge did not weigh all of the relevant evidence together in his determination that claimant did not suffer from pneumoconiosis, he specifically found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to each of the subsections at 20 C.F.R. §718.202(a)(1)-(4). Thus, his findings conform to the Fourth Circuit holding in *Compton*.

In considering whether the x-ray evidence of record was sufficient to establish the existence of pneumoconiosis, the administrative law judge initially noted his agreement with Judge Cox that the evidence submitted in connection with claimant's 1983 claim was insufficient to establish the existence of pneumoconiosis. Decision and Order at 4-5. The administrative law judge noted that Judge Cox considered eight interpretations of four x-rays dated September 6, 1980, August 5, 1983, August 18, 1983 and July 27, 1984. *Id.* He noted that claimant's August 5, 1983 and July 27, 1984 films were uniformly interpreted as negative for pneumoconiosis. *Id.* The administrative law judge further noted that the only B reader who interpreted claimant's September 6, 1980 x-ray found that the film was negative for pneumoconiosis. *Id.* Although two physicians dually qualified as B readers and Board-certified radiologists interpreted claimant's August 18, 1983 x-ray as positive for pneumoconiosis, Judge Cox accurately noted that a contemporaneous x-ray taken on August 5, 1983 was read as negative for pneumoconiosis by an equally qualified physician. *See* Director's Exhibit 22. Inasmuch as it is based on substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence submitted in connection with claimant's 1983 claim was insufficient to establish the existence of pneumoconiosis.

The administrative law judge next noted that Judge Levin considered interpretations of two additional x-rays taken on January 5, 1996 and February 9, 1997. Decision and Order at 5; Director's Exhibit 37. Although Dr. Hickey, a B reader and Board-certified radiologist, interpreted claimant's January 5, 1996 x-ray as positive for pneumoconiosis, Director's Exhibit 13, two equally qualified physicians, Drs. Francke and Sargent, interpreted this x-ray as negative for pneumoconiosis. Director's Exhibits 11, 12. Dr. Castle, a B reader, interpreted a February 19, 1997 x-ray as negative for pneumoconiosis. Director's Exhibit 25. The administrative law judge properly found that this additional x-ray evidence was

[6]Inasmuch as claimant's most recent coal mine employment took place in West Virginia, the law of the United States Court of Appeals for the Fourth Circuit is applicable. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

insufficient to establish the existence of pneumoconiosis. Decision and Order at 5.

Finally, the administrative law judge considered the x-ray evidence submitted in connection with claimant's request for modification. Although Dr. Cappiello interpreted claimant's April 15, 1999 x-ray as revealing "changes of simple pneumoconiosis," Director's Exhibit 38, the administrative law judge properly found that Dr. Cappiello's interpretation was not properly classified for pneumoconiosis. Decision and Order at 5; *see* 20 C.F.R. §718.102(b). The administrative law judge accurately noted that the only other newly submitted x-ray, a film dated May 18, 1998, was found to be unreadable. Decision and Order at 5; Director's Exhibit 43.

Inasmuch as it is based upon substantial evidence,[7] we affirm the administrative law judge's finding that the x-ray evidence of record is insufficient to establish the existence of pneumoconiosis.

Since the record does not contain any biopsy or autopsy evidence, claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Furthermore, claimant is not entitled to any of the statutory presumptions arising under 20 C.F.R. §718.202(a)(3). Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed the instant claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, inasmuch as the instant claim is not a survivor's claim, the Section 718.306 presumption is also inapplicable. *See* 20 C.F.R. §718.306. Consequently, claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3).

In his consideration of whether the medical opinion evidence of record was sufficient to establish the existence of pneumoconiosis, the administrative law judge initially noted that there were only two medical opinions submitted in connection with claimant's 1983 claim. The administrative law judge noted that while Dr. Rasmussen opined in 1983 that claimant suffered from pneumoconiosis, Dr. Hippensteel opined in 1988 that claimant did not suffer from the disease.[8] Decision and Order at 5; Director's Exhibit 22. In his consideration of

[7]The administrative law judge did not address Dr. DeRamos's positive interpretation of a January 17, 1987 x-ray. *See* Director's Exhibit 6. However, inasmuch as the July 17, 1987 x-ray is more than ten years older than the most recent x-ray of record, and because the record does not reveal that Dr. DeRamos possesses any special radiological qualifications, the administrative law judge's failure to consider Dr. DeRamos's x-ray interpretation constitutes harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1284 (1986).

[8]Contrary to the administrative law judge's characterization, Dr. Hippensteel rendered

claimant's 1983 claim, Judge Cox found, *inter alia*, that Dr. Hippensteel's opinion was better reasoned than that of Dr. Rasmussen. *Id.* The administrative law judge adopted Judge Cox's conclusion that the medical opinion evidence submitted in connection with claimant's 1983 claim was insufficient to establish the existence of pneumoconiosis, a finding supported by substantial evidence. Decision and Order at 4-5.

The administrative law judge noted that Judge Levin considered the medical reports of Drs. Vasudevan, Krishnan, Najjar and Castle. Decision and Order at 5; Director's Exhibits 8, 24, 33, 38. The administrative law judge discredited Dr. Vasudevan's opinion because of the conflicting nature of his January 5, 1996 report. The administrative law judge noted that although Dr. Vasudevan referenced a positive interpretation of a January 5, 1996 x-ray, he subsequently indicated that claimant did not suffer from any cardiopulmonary diseases. *See* Decision and Order at 5; Director's Exhibit 8.

The administrative law judge properly discredited Dr. Krishnan's diagnosis of pneumoconiosis because it was based exclusively upon "historical reference." *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 5; Director's Exhibits 24, 38. The administrative law judge also permissibly discredited Dr. Najjar's diagnosis of pneumoconiosis because it was not sufficiently reasoned. *Clark*, *supra*; *Lucostic*, *supra*; Decision and Order at 5; Director's Exhibit 33.

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his opinion in 1983, not 1988. *See* Director's Exhibit 22.

The record reveals that Dr. Hippensteel is Board-certified in Internal Medicine and Pulmonary Disease. Director's Exhibit 22. Although Dr. Rasmussen's qualifications are not found in the record, Judge Cox characterized Dr. Rasmussen as being Board-certified in Internal Medicine. *Id.*

The only other medical opinion of record is that of Dr. Castle. In a report dated April 10, 1997, Dr. Castle indicated that there was no evidence of coal workers' pneumoconiosis.[9] Director's Exhibit 25. Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(4).

In light of our affirmance of the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *Trent, supra*; *Gee*, *supra*; *Perry*, *supra*. Consequently, we need not address the administrative law judge's finding that the evidence is insufficient to establish total disability. *Larioni*, *supra*.

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

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[9]In response to claimant's untimely submission of a February 22, 2000 pulmonary function study, employer submitted post-hearing evidence in the form of a March 5, 2001 medical report from Dr. Castle. Dr. Castle reiterated his earlier opinion that claimant did not suffer from pneumoconiosis.

At the hearing, employer objected to the admission of the results of a pulmonary function study conducted on February 22, 2000. Employer asserted that this evidence was obtained by claimant while the case was pending before the district director and was withheld by claimant until the case was forwarded to the Office of Administrative Law Judges, thereby constituting a violation of 20 C.F.R. §725.456(d) (2000). Although the administrative law judge agreed with employer, the administrative law judge agreed to admit the results of the February 22, 2000 pulmonary function study, provided that employer was provided an opportunity to develop rebuttal evidence in the form of a pulmonary function study. Although claimant subsequently underwent pulmonary function testing on January 31, 2001, claimant did not provide maximal effort during the administration of the study. Because claimant deprived employer of a meaningful opportunity to respond to the February 22, 2000 pulmonary function study, the administrative law judge excluded the study from consideration. *See* Decision and Order at 3 n.1.

Because the administrative law judge ultimately excluded claimant's February 22, 2000 pulmonary function study from the record, Dr. Castle's March 5, 2002 report, submitted as rebuttal to that evidence, should have also been excluded. However, because the administrative law judge properly discredited all of the medical opinion evidence supportive of a finding of pneumoconiosis, the administrative law judge's consideration of this report constitutes harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1284 (1986).

affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge