BRB No. 98-0647 BLA

CHAD PENIX	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
CONSOLIDATION COAL COMPANY	)	
	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Chad Penix, Moneta, Virginia, *pro se*.

Mary Rich Maloy (Jackson & Kelly), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (97-BLA-0792) of Administrative Law Judge Stuart A. Levin 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). Claimant's first application for benefits filed on April 21, 1972 was finally denied by the Social Security Administration on January 27, 1976, and his second application for benefits filed on April 2, 1976 was finally denied by the Department of Labor on November 26, 1990. Director's Exhibit 34. On March 19, 1996, claimant filed the present application, which is a duplicate claim because it was filed more than one year after

the previous denial. Director's Exhibit 1; *see* 20 C.F.R. §725.309(d).

Prior to the scheduled hearing, claimant informed the administrative law judge in writing that he waived his right to a hearing and requested a decision on the record. Claimant's Letter, May 27, 1997; *see* 20 C.F.R. §725.461(a). Subsequently, employer indicated that it had no objection to a decision on the record, and the hearing was canceled. Employer's Letter, June 3, 1997; Employer's Brief at 2.

Considering the claim on the record only, the administrative law judge found that the new evidence failed to establish either the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(c), and concluded therefore that a material change in conditions was not established as required by 20 C.F.R. §725.309(d). Accordingly, he denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

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. *McFall v. Jewell Ridge Coal Co*., 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with 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 (1965).

To be entitled to benefits under 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Where a claimant files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that there has been a material change in conditions. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that pursuant to Section 725.309(d), the administrative law judge must determine whether the evidence developed since the prior denial establishes at least one of the elements previously

adjudicated against claimant. *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). If so, the administrative law judge must then consider whether all of the evidence establishes entitlement to benefits. *Rutter, supra*.

Claimant was previously denied benefits because he failed to establish invocation of the interim presumption of total disability due to pneumoconiosis arising out of coal mine employment by any of the methods provided at 20 C.F.R. §727.203(a)(1)-(4). Director's Exhibit 34. Therefore, the threshold issue in claimant's duplicate claim filed under 20 C.F.R. Part 718 was whether the new evidence established a material change in conditions by proving either the existence of pneumoconiosis or total respiratory disability pursuant to Sections 718.202(a) or 718.204(c). *See Rutter, supra*.

Pursuant to Section 718.202(a)(1), the administrative law judge concluded that the weight of the new x-ray evidence failed to establish the existence of pneumoconiosis. Decision and Order at 4. The record contains eighteen readings of five x-rays taken since the prior denial. There were four positive readings and fourteen negative readings. Two of the positive readings were by a Board-certified radiologist and B-reader, and two were by a physician whose radiological credentials are not in the record. Director's Exhibits 18, 20; Claimant's Exhibits (unstamped).[1] Three of the negative readings were rendered by B-readers, and eleven of the negative readings were by physicians qualified as both Board-certified radiologists and B-readers. Director's Exhibits 28, 29, 33; Employer's Exhibits (unstamped).

[1] Claimant's and employer's exhibits are not identified by number.

In weighing the x-ray readings, the administrative law judge properly considered that the two x-rays read as positive by Dr. Bassali, a B-reader, were reread as negative by Drs. Abramowitz, Binns, Castle, Forehand, and Wershba, also B-readers, and that the two x-rays read as positive by Dr. Subramaniam, whose credentials are not of record, were re-read as negative by B-readers Drs. Sargent, Shipley, Spitz, and Wiot. Decision and Order at 2-4; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). The administrative law judge permissibly found that, "[c]onsidered quantitatively and qualitatively then, the x-ray evidence is, on balance, negative for pneumoconiosis."[2] Decision and Order at 4; *see Adkins, supra*; *Edmiston v. F & R Coal Co*., 14 BLR 1-65 (1990). Substantial evidence supports the administrative law judge's finding. We therefore affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(2), the administrative law judge correctly found that the record contains no biopsy evidence. Decision and Order at 4. We therefore affirm this finding, and we note, pursuant to Section 718.202(a)(3), that the presumptions at Sections 718.304, 718.305, and 718.306 are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.304, 718.305, 718.306.

Pursuant to Section 718.202(a)(4), the record contains five medical opinions obtained since the prior denial. Dr. Kottapalli, Medical Director of the Black Lung Clinic in Man, West Virginia, examined claimant and reviewed his medical records. In his January 29, 1997 report, Dr. Kottapalli diagnosed pneumoconiosis based upon a physical examination, a 1/1 chest x-ray, a pulmonary function study revealing restrictive lung disease, claimant's clinical history, and claimant's history of coal dust exposure. Claimant's Exhibit (unstamped). By contrast, Drs. Vasudevan and Castle, based upon examinations, and Drs. Hippensteel and Keeley, based upon medical record reviews, opined that claimant does not have pneumoconiosis or any respiratory impairment arising out of coal mine employment. Director's Exhibits 16,

[2] In so finding, the administrative law judge overlooked Dr. Hippensteel's negative reading of the September 12, 1996 x-ray and Dr. Wiot's negative reading of the November 20, 1996 x-ray. Employer's Exhibits (unstamped). The administrative law judge's error is harmless, as these readings could only have supported his finding. *See Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984).

28; Employer's Exhibits (unstamped). Each of these four physicians is Board-certified in Internal Medicine and Pulmonary Disease.

In making his finding at Section 718.202(a)(4), the administrative law judge considered the reports of Drs. Vasudevan, Castle, Hippensteel, and Keeley, but overlooked Dr. Kottapalli's diagnosis of pneumoconiosis. As a result, he found incorrectly that the "physicians who have evaluated claimant since 1990 . . . all fail[ed] to diagnose pneumoconiosis." Decision and Order at 4. This erroneous conclusion was the sole basis of the administrative law judge's finding that a material change in conditions was not established at Section 718.202(a)(4). Because the administrative law judge failed to analyze all of the relevant evidence, we must vacate his findings at Sections 718.202(a)(4) and 725.309(d) and remand this case for further consideration.[3] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); *Rutter, supra*.

However, pursuant to Section 718.204(c)(1)-(3), the administrative law judge noted accurately that the new pulmonary function and blood gas studies yielded non-qualifying[4] values, Director's Exhibits 13, 14, 17, 28, and that the record does not contain a diagnosis of cor pulmonale with right-sided congestive heart failure. We therefore affirm these findings. In addition, pursuant to Section 718.204(c)(4), the administrative law judge correctly found that the new medical opinions by Drs. Vasudevan, Castle, Hippensteel, and Keeley did not diagnose total respiratory disability. *See Lane v. Union Carbide Corp*., 105 F.3d 166, 172-73, 21 BLR 2-34, 2-45 (4th Cir. 1997). The administrative law judge did not discuss Dr. Kottapalli's report, but Dr. Kottapalli did not express an opinion on the issue of respiratory disability. *See Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984). Therefore, we affirm the administrative law judge's finding that a material change in conditions was not established at Section 718.204(c)(4).

We have affirmed the administrative law judge's finding that a material change

---

[3] We must reject employer's argument that the administrative law judge's omission was harmless error because, employer asserts, Dr. Kottapalli's opinion was equivocal, unreasoned, and based upon a discredited x-ray reading. Employer's Brief at 5. The Board is not empowered to weigh the evidence. *See* 20 C.F.R. §802.301(a); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988).

[4] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

in conditions was not established at Sections 718.202(a)(1)-(3) and 718.204(c), but the administrative law judge has yet to consider all of the relevant new evidence at Section 718.202(a)(4). On remand, the administrative law judge must weigh all of the new medical opinions pursuant to Section 718.202(a)(4) to determine whether the existence of pneumoconiosis and hence, a material change in conditions, is established. If the administrative law judge determines that a material change in conditions is established, he must consider whether all of the evidence, *i.e.*, the new evidence along with any earlier evidence, establishes entitlement to benefits. *See Rutter, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge