BRB No. 99-0362 BLA

ALFRED J. HENRY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TENNESSEE CONSOLIDATED COAL 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 Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Robert J. Harriss (Harriss, Hartman, Aaron, Wharton, Boyd & Secord, P.C.), Rossville, Georgia, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen, Chartered), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-1955) of Administrative Law Judge Mollie W. Neal denying benefits on a duplicate 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). The administrative law judge credited claimant with at least thirteen years of coal mine employment and, based on the date

of filing, adjudicated this duplicate claim[1] pursuant to the regulations contained in 20 C.F.R Part 718. Decision and Order at 2-4. The administrative law judge, noting the proper standard, found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R §718.202(a)(1)-(4), and total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) and thus insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Decision and Order at 3-8. Accordingly, benefits were denied. On appeal, claimant generally challenges the administrative law judge's denial of benefits and asserts that a remand is required for a more complete evaluation. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

[1]Claimant filed his initial claim for benefits on January 11, 1988, which was denied by Administrative Law Judge E. Earl Thomas by Decision and Order dated October 11, 1990, for failure to establish the existence of pneumoconiosis. Director's Exhibit 23-28. The Board affirmed this denial on September 25, 1992. Director's Exhibit 23-35. Claimant filed the instant claim on December 9, 1996. Director's Exhibit 1.

Initially, the administrative law judge properly considered the newly submitted evidence of record and found that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309. The administrative law judge correctly noted that the previous claim was denied as claimant did not establish the existence of pneumoconiosis. Decision and Order at 2; Director's Exhibit 23-28. The United States Court of Appeals for the Sixth Circuit has held that in assessing whether the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R §725.309, an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him.[2] *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

The administrative law judge properly found the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R §718.202(a)(1) as the two newly submitted x-ray readings were negative for the existence of pneumoconiosis. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994); Decision and Order at 4; Director's Exhibits 9, 10. Upon review of the record, substantial evidence supports the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). *See Woodward, supra*; *Fitts, supra*.

Further, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) since the record does not contain any biopsy results demonstrating the presence of pneumoconiosis. Decision and Order at 5. Additionally, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3) since none of the presumptions set forth therein is applicable to the instant claim.[3] *See* 20 C.F.R. §§718.304, 718.305, 718.306; Decision and Order at

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[2]This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was employed in the coal mine industry in Tennessee. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3]The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Claimant is not entitled to the presumption at 20 C.F.R. §718.305 because he filed his claim after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 1. Lastly, this claim is not a survivor's claim; therefore, the presumption at 20 C.F.R. §718.306 is also inapplicable.

5.

Next, in finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge considered the relevant, newly submitted medical opinions of Drs. Meyers and Soteres and rationally concluded that they are insufficient to establish claimant's burden of proof. Director's Exhibits 6, 7; Decision and Order at 5-6; *Trent, supra*; *Perry, supra*. The administrative law judge acted within her discretion in concluding that the opinion of Dr. Meyers is insufficient to establish the existence of pneumoconiosis as the physician's diagnosis of possible coal miner's pneumoconiosis was equivocal and she did not relate any other diagnosed condition to coal dust exposure. Director's Exhibit 6; Decision and Order at 5-6; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Dockins v. McWane Coal Co.*, 9 BLR 1-57 (1986). Additionally, the administrative law judge properly concluded that the opinion of Dr. Soteres is insufficient to establish the existence of pneumoconiosis as the physician did not relate his diagnosis of bronchitis and asthma to coal dust exposure. Director's Exhibit 7; Decision and Order at 6; *Dockins, supra*. Moreover, we reject claimant's contention that the administrative law judge should have applied the "true doubt" rule when considering the medical evidence of record, which claimant alleges is equally probative.[4] The United States Supreme Court has held that the application of the true doubt rule violates Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), as it relieves claimants of their burden of proof in establishing entitlement to benefits. *See Director, OWCP v. Greenwich Collieries* [Ondecko], 114 S.Ct. 2251, 18 BLR 2A-1 (1994). Thus, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Since claimant failed to establish the existence of pneumoconiosis, the administrative law judge properly concluded that the newly submitted evidence is insufficient to establish a material change in conditions at 20 C.F.R. §725.309.[5] *See*

[4]"True doubt" is said to arise only when equally probative but contradictory evidence is presented in the record, where selection of one set of facts would resolve the case against the claimant, but selection of the contradictory set of facts would resolve the case for claimant. *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983); *Provance v. United States Steel Corp.*, 1 BLR 1-483 (1978).

[5]Although the administrative law judge considered the newly submitted evidence pursuant to 20 C.F.R. §718.204(c)(1)-(4), the prior claim was denied solely on the basis that claimant did not establish the existence of pneumoconiosis. Decision and Order at 6-8;

Ross, *supra*. Consequently, we affirm the administrative law judge's denial of benefits as it is supported by substantial evidence and is in accordance with law.

Finally, in his Petition for Review and Brief filed with the Board on March 10, 1999, claimant, through counsel, submitted additional evidence and requested that the case be remanded for further evaluation of claimant's condition. *See* Claimant's Brief at 10-11. As the Board is without authority to consider new evidence on appeal, *see* 20 C.F.R. §802.301; *Berka v. North American Coal Corp.*, 8 BLR 1-183 (1985), we construe this request to be a petition for modification pursuant to 20 C.F.R. §725.310. *Consolidation Coal Co. v. Worrell,* 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

The United States Courts of Appeals for the Sixth Circuit has held that modification proceedings must be initiated before the district director pursuant to 20 C.F.R. §725.310. *Saginaw Mining Co. v. Mazzulli*, 818 F.2d 1278 10 BLR 2-119 (6th Cir. 1987). Pursuant to this decision, the petition for modification in this case must be filed with the district director, and the Board will remand the case to the district director to process the petition.

Director's Exhibits 6, 7, 23-28, 23-35; *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

The district director's role in processing a modification petition is ministerial and administrative. The authority of the district director is limited to processing the petition under the same procedures applicable to other claims. *Hoskins v. Director, OWCP,* 11 BLR 1-144 (1988). As this claim arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, we remand the case to the district director for consideration of the request for modification.[6]

After the request for modification is processed by the district director, the case may be transferred to an administrative law judge for a hearing pursuant to the regulations. In the event the administrative law judge denies modification and claimant wishes the Board to consider whether the denial of modification was erroneous, a Notice of Appeal must be filed. The Notice of Appeal must be filed with the Board within thirty (30) days of the date the Order on Modification is filed. 20 C.F.R. §802.205. The appeal of the Order on Modification will be assigned a new docket number.

In the event an administrative law judge grants modification, any party who is aggrieved by the Order granting modification may file an appeal with the Board within thirty (30) days of the date the Order granting Modification is filed. 20 C.F.R. §§802.205, 802.301(c).

[6]On appeal, claimant also asserts that the case should be remanded for a more complete evaluation and further opinion by Dr. Soteres. *See* Claimant's Brief at 11. Claimant bears the burden of establishing entitlement in this case. *See White v. Director, OWCP,* 6 BLR 1-368 (1983). Therefore, claimant can seek a more definite opinion from Dr. Soteres and submit this evidence to the district director on modification.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed and the case is remanded to the district director to address the request for modification in accordance with this opinion.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge