BRB No. 02-0290 BLA

GABRIEL MOBLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ELKAY 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-Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Gabriel Mobley, Chapmanville, West Virginia, *pro se*.

Mary Rich Maloy (Jackson & Kelly, PLLC) Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order-Denying Benefits (1998-BLA-0196) of Administrative Law Judge Daniel L. Leland rendered on a duplicate claim[1] 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 administrative

[1] Claimant filed his initial claim for benefits on September 28, 1990, which was denied on March 11, 1991. Director's Exhibit 29. Claimant filed the instant duplicate claim on February 10, 1997. Director's Exhibits 1, 26.

[2] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations

law judge credited claimant with fourteen years of coal mine employment and found that the newly submitted evidence failed to establish the existence of pneumoconiosis or total disability and thus, found that a material change in conditions was not established pursuant to *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), *cert denied*, 510 U.S. 1090 (1997). Accordingly, benefits were denied. On appeal, claimant generally contends that he is entitled to benefits. In response, employer argues that the administrative law judge's Decision and Order-Denying Benefits is supported by substantial evidence. The Director, Office of Workers' Compensation Programs, is not participating 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 Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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 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 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*).

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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.

Section 725.309(c)(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.[3] 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 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. *Rutter, supra*. If claimant establishes the existence of that 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 the evidence, including the evidence submitted with claimant's prior claim, supports a finding of entitlement to benefits. *Id.*

In evaluating the newly submitted x-ray evidence, the administrative law judge gave greatest weight to the opinions of physicians who are dually qualified as Board-certified radiologists and B readers. Decision and Order-Denying Benefits at 9. The administrative law judge found that the preponderance of the x-ray evidence fails to establish the existence of pneumoconiosis because only three dually qualified physicians, and two B readers found radiographic evidence of pneumoconiosis while six dually qualified physicians, and three B readers found no radiographic evidence of pneumoconiosis. *Id.*

While the administrative law judge correctly considered the qualifications of the x-ray readers, his analysis does not indicate consideration of the progressive nature of pneumoconiosis. *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). The administrative law judge does not discuss the two and one-half year span between the August 1997 x-ray with conflicting interpretations by dually qualified physicians and the most recent x-ray, dated February 12, 2000, that was uniformly interpreted positive for pneumoconiosis by dually qualified physicians.[4] 20 C.F.R. §718.201; *Adkins, supra; Clark*

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[3]The amendments to the regulation at 20 C.F.R. §725.309 (2002) do not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2.

[4] The newly submitted x-ray evidence of record consists of twenty-four interpretations of three x-rays. The February 21, 1997 x-ray was read negative for pneumoconiosis, by six dually qualified physicians and three B readers, and positive for pneumoconiosis, by two B readers. Director's Exhibits 13, 14, 23-25; Employer's Exhibits 10, 11,15, 16. The August 27, 1997 x-ray was read negative for pneumoconiosis, by four dually qualified physicians and two B readers, and positive for pneumoconiosis, by three dually qualified physicians. Claimant's Exhibits 1-3; Employer's Exhibits 1, 2, 4, 15, 16. The February 12, 2000 and most recent x-ray was read positive for pneumoconiosis, by three dually qualified physicians, and negative for pneumoconiosis, by a B reader. Claimant's

v. Karst-Robbins Coal Co., 12 BLR 1-149 (1989) (*en banc*); *Edwards v. Director, OWCP*, 6 BLR 1-265 (1983). Therefore, we vacate the administrative law judge's finding that the preponderance of the newly submitted x-ray evidence did not establish the existence of pneumoconiosis and remand the case for the administrative law judge to consider whether the later evidence in this case is more persuasive. *See Adkins; supra.*

In considering the newly submitted medical reports, the administrative law judge accorded "no relevance" to the medical reports of Drs. Renn and Zaldivar because they invalidated a pulmonary function study administered by Dr. Donahoe on November 1, 1999 that was "not included in the record." Decision and Order-Denying Benefits at 5, n.2. The record, however, contains a letter from claimant dated January 11, 2000 that is stamped "[r]eceived January 26, 2000." Unmarked Exhibit. Attached to claimant's letter, is a letter discussing claimant's medical condition, from Dr. Donahoe dated November 17, 1999, as well as Dr. Donahoe's hospital treatment notes and a pulmonary function study dated November 1, 1999. Employer also references Dr. Donahoe's November 1999 report and pulmonary function study in his response brief. Employer's Brief 4, 8. Because there is no discussion or acknowledgment regarding this evidence in the record, we must vacate the denial of benefits and remand the case to the administrative law judge to determine if this evidence was properly submitted into the record and if so, if it was inadvertently omitted from consideration along with the other relevant evidence of record. *Clark, supra*; *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Further, if Dr. Donahoe's November 1999 opinion and the results of his pulmonary function studies, are found to be properly admitted into the record, they must be weighed with the all the newly submitted medical evidence of record. Therefore, we must also vacate the administrative law judge's findings pursuant to Sections 718.202(a)(4), 718.204(b),(c).

Under Section 718.202(a)(4), the administrative law judge acknowledged Dr. Donahoe's status as claimant's treating physician and found that in his May 19, 1997 letter, diagnosing chronic obstructive pulmonary disease related to pneumoconiosis, Dr. Donahoe failed to provide a basis for his conclusion. Decision and Order-Denying Benefits at 9. Further, the administrative law judge found that Dr. Ranavaya's diagnosis of pneumoconiosis was based on claimant's seventeen years of coal mine employment and a positive x-ray. *Id*. The administrative law judge noted that the preponderance of the x-ray evidence readings are negative for pneumoconiosis and that claimant's coal mine employment, by itself, is insufficient to show that he has pneumoconiosis. The administrative law judge then gave the contrary opinions of the Board-certified pulmonologists of record, Drs. Castle, Fino, Stewart,

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Exhibits 4-6; Employer's Exhibit 21.

Jarboe, Hippensteel and Dahhan, controlling weight finding their opinions well documented and more consistent with the objective data than the opinions of Drs. Donahoe and Ranavaya. *Id.*

The administrative law judge relied in part on his finding that the x-ray evidence did not establish the existence of pneumoconiosis as a reason to give less weight to Dr. Ranavaya's opinion and greater weight to the contrary opinions. However, since we have vacated the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), on remand the administrative law judge should reconsider the weight accorded to the medical opinions based on their reliance on the x-ray evidence of record in light of his reconsider of the x-rays pursuant to Section 718.202(a)(1). See 20 C.F.R. §718.202(a)(4). In addition, the administrative law judge must reconsider the relevance of the medical reports of Drs. Renn and Zaldivar. See Decision and Order-Denying Benefits at 5 n.2.

In considering the issue of total disability, the administrative law judge properly found that all the newly submitted blood gas studies of record are non-qualifying pursuant to Section 718.204(b)(2)(ii), and that there is no evidence that claimant has cor pulmonale pursuant to Section 718.204(b)(2)(iii). Decision and Order-Denying Benefits at 9; Director's Exhibits 12, 21. Under Section 718.202(b)(2)(i), the administrative law judge considered the February 1997, April 1997, and February 2000 pulmonary function studies. Decision and Order-Denying Benefits at 4, 9. Director's Exhibits 9, 10; Employer's Exhibits 21. However, the record also contains pulmonary function studies performed on August 27, 1997 values that were not considered by the administrative law judge. Employer's Exhibit 8. Additionally, the administrative law judge must consider all the pulmonary function studies and validation reports and provide an adequate rationale for the weight accorded the evidence under Section 718.204(b)(2)(i). *Allen v. Director, OWCP*, 69 F.3d 532, 20 BLR 2-97 (4 th Cir. 1995); *Siegel v. Director, OWCP*, 8 BRB 1-156 (1985).

Lastly, in weighing the medical opinions under Section 718.204(b)(2)(iv), the administrative law judge found that Drs. Castle, Fino, Stewart, Jarboe, Hippensteel and Dahhan concluded that claimant is not disabled from returning to his last coal mine job. Decision and Order-Denying Benefits at 10. The administrative law judge, however, had concluded in the same paragraph that "Dr. Dahhan was not able to render an opinion as to whether or not claimant could return to his coal mine job in 2000." *Id.* On remand, the administrative law judge should resolve this inconsistency in his findings based on the record and the weigh accorded to Dr. Dahhan's opinion.

The administrative law judge must reconsider the issues on remand and if he determines that claimant has demonstrated a material change in conditions, he must address the merits of entitlement in light of a weighing of the evidence submitted with the prior

claims together with the newly submitted evidence of record. *See Rutter, supra*.

Accordingly, the administrative law judge's Decision and Order-Denying Benefits is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge