BRB No. 02-0503 BLA

REX HAYDEN MOSES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY 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 Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Rex Hayden Moses, Greensburg, Kentucky, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (01-BLA-0539) of Administrative Law Judge Thomas F. Phalen, Jr. 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).[1] Based upon the parties'

[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.

stipulation, the administrative law judge credited claimant with thirty-eight years of coal mine employment and adjudicated this duplicate claim pursuant to the regulations contained in 20 C.F.R. Part 718.[2] The administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found the newly submitted evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Consequently, the administrative law judge found the evidence insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[3] Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, 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 on appeal to be whether the Decision and Order below is supported by

[2]Claimant's initial claim was filed in November 1993. Director's Exhibit 22. On October 17, 1995, Administrative Law Judge Donald W. Mosser issued a Decision and Order denying benefits, *id*., which the Board affirmed, *Moses v. Peabody Coal Co.*, BRB No. 96-0450 BLA (Dec. 9, 1996)(unpub.). Judge Mosser's denial was based upon claimant's failure to establish the existence of pneumoconiosis and total disability. *Id*. Claimant subsequently filed a request for reconsideration which the Board denied. *Moses v. Peabody Coal Co.*, BRB No. 96-0450 BLA (Feb. 6, 1997)(unpub. Order on Motion for Reconsideration). Because claimant did not pursue this claim any further, the denial became final. Claimant's most recent claim was filed in October 1999. Director's Exhibit 1.

[3]The revisions to the regulation at 20 C.F.R. §725.309 apply only to claims filed after January 19, 2001.

substantial evidence. *See 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we note that claimant appeared before the administrative law judge without the assistance of counsel. Based on the facts of the instant case, we hold that there was a valid waiver of claimant's right to be represented, *see* 20 C.F.R. §725.362(b), and that the administrative law judge provided claimant with a full and fair hearing, *see Shapell v. Director, OWCP*, 7 BLR 1-304 (1984); Hearing Transcript at 6-40; Administrative Law Judge's Exhibit 2.

We next address the administrative law judge's consideration of the evidence at 20 C.F.R. §725.309 (2000). After considering the newly submitted evidence, the administrative law judge found that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309 (2000). The administrative law judge stated that the previous claim was denied because claimant did not establish the existence of pneumoconiosis or total disability. Decision and Order at 3; *see* Director's Exhibit 22. In *Sahara Coal Co. v. Director, OWCP* [*McNew*], 946 F.2d 554, 15 BLR 2-227 (7th Cir. 1991), the United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, held that a material change in conditions is established where the miner did not have pneumoconiosis at the time of the first application but has since contracted it and become totally disabled by it, or where the miner's pneumoconiosis has progressed to the point of total respiratory disability since the filing of the first application.[4] In *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 21 BLR 2-113

[4]Based upon his finding that the instant case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, the administrative law judge applied the standard for establishing a material change in conditions enunciated in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). However, the record indicates that claimant's coal mine employment occurred in Illinois. Director's Exhibits 2, 22. Consequently, the instant case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*). The administrative law judge, therefore, should have applied the material change standard set out in *Sahara Coal Co. v. Director, OWCP [McNew]*, 946 F.2d 554, 15 BLR 2-227 (7th Cir. 1991) and *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997). Nonetheless, given the facts of this case and the administrative law judge's weighing of the relevant evidence, *see* discussion, *infra*, we hold that the outcome of the instant case would have been

(7th Cir. 1997), the Seventh Circuit clarified what a claimant must show to establish a material change in conditions. The Seventh Circuit held that claimant cannot simply bring in new evidence that addresses the miner's condition at the time of the earlier denial, but must show something capable of making a difference has changed since the record closed on the first application.[5] The Seventh Circuit also agreed that the one-element test enunciated by the Sixth Circuit for ascertaining a material change in conditions is the appropriate test since it implies that the earlier denial was correct.[6] Consequently, in order to establish a material change in conditions at 20 C.F.R. §725.309 (2000), claimant must establish either the existence of pneumoconiosis or total disability based upon the newly submitted evidence. *See Spese, supra*; *McNew, supra*.

In finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), the administrative law judge considered the newly submitted x-ray evidence. Of the five newly submitted x-ray interpretations of record, four readings are negative for pneumoconiosis, Director's Exhibits 6, 7; Employer's Exhibits 3, 4, and one reading is positive, Employer's Exhibit 2. The administrative law judge properly accorded greater weight to the negative x-ray readings which were provided by physicians who are B readers.[7] *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993);

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the same even had the administrative applied the material change standard set out in *McNew* and *Spese*. Thus, the administrative law judge's error in relying upon the material change standard set out in *Ross* is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[5]The United States Court of Appeals for the Seventh Circuit noted that "if by...[the "one-element"test] the Director means that at least one element that might independently have supported a decision against claimant has now been shown to be different (implying that the earlier denial was correct), then we would agree that the "one-element"test is the correct one." *Spese, supra*.

[6]The one-element test requires a claimant to prove, based on all the new favorable and unfavorable medical evidence of his condition since the previous denial, at least one of the elements of entitlement previously adjudicated against him. *See Spese, supra*.

[7]Dr. Westerfield, a B reader, and Dr. Sargent, a B reader and a Board-certified radiologist, read the November 11, 1999 x-ray as negative for pneumoconiosis. Director's Exhibits 6, 7. Drs. Wheeler and Wiot, B readers, read the June 20, 2001 x-ray as negative for pneumoconiosis, Employer's Exhibits 3, 4, while Dr. Powell read the same x-ray as positive for pneumoconiosis, Employer's Exhibit 2. Although Dr. Powell indicated that he had taken a test to become a B reader, he also noted that his test results were pending at the time he read the June 20, 2001 x-ray. Employer's Exhibit 2.

Roberts v. Bethlehem Mines Corp., 8 BLR 1-211 (1985). Moreover, since four of the five x-ray interpretations of record are negative for pneumoconiosis, we hold that 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).[8] *See Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994); *see also Director, OWCP v. Greenwich Collieries* [*Ondecko*], 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Next, 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 there is no biopsy or autopsy evidence demonstrating the existence of pneumoconiosis. In addition, 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. *See* 20 C.F.R. §§718.304, 718.305, 718.306. The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Similarly, 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.

[8]The administrative law judge stated, "I give more weight to the interpretation of the one B-reader, Dr. Wiot, and thus find that the 6-20-01 film is negative for pneumoconiosis." Decision and Order at 9-10. Contrary to the administrative law judge's finding, Dr. Wheeler, who read the June 20, 2001 x-ray as negative for pneumoconiosis, is also a B reader. Employer's Exhibit 3. Nonetheless, since proper consideration of Dr. Wheeler's credentials would provide further support for the administrative law judge's finding that pneumoconiosis is not established at 20 C.F.R. §718.202(a)(1), we hold that the administrative law judge's failure to properly consider the qualifications of Dr. Wheeler is harmless error. *See Larioni, supra*.

With regard to 20 C.F.R. §718.202(a)(4), the administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis. The administrative law judge stated that "Dr. Westerfield opined that [claimant] does not suffer from pneumoconiosis or any other cardiopulmonary disease."[9] Decision and Order at 10. In contrast, the administrative law judge stated that "Dr. Powell opined that [claimant] does suffer from pneumoconiosis" and "Dr. Qaisi also opined that [claimant] suffers from pneumoconiosis."[10] *Id*. at 11. The administrative law judge permissibly discredited the opinion of Dr. Powell because Dr. Powell's diagnosis of pneumoconiosis was based in part on a positive interpretation of an x-ray that was subsequently reread as negative by physicians with superior qualifications.[11] *See Winters v. Director, OWCP*, 6 BLR 1-877, 881 n.4 (1984). In addition, the administrative law judge permissibly discredited Dr. Qaisi's opinion because it is vague and equivocal.[12] *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). Since it is supported by substantial evidence, 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).[13]

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[9]Dr. Westerfield noted "none" in the cardiopulmonary diagnosis section of a report dated November 11, 1999. Director's Exhibit 6. In a form attached to the November 11, 1999 report, Dr. Westerfield responded "no" to the question, "does the miner have an occupational lung disease which was caused by his coal mine employment?" *Id*.

[10]In a report dated August 15, 2000, Dr. Qaisi opined that claimant shows all the classical manifestations of black lung and that the x-rays show all the classical manifestations of pneumoconiosis. Director's Exhibit 21. Dr. Powell, in a report dated June 20, 2001, noted an abnormal chest x-ray consistent with Category I/I, Q/Q coal workers' pneumoconiosis and hypertensive cardiovascular disease. Employer's Exhibit 2.

[11]Whereas Dr. Westerfield read the June 20, 2001 x-ray as positive for pneumoconiosis, Employer's Exhibit 2, Drs. Wheeler and Wiot, B readers, reread the same x-ray as negative, Employer's Exhibits 3, 4. As previously noted, the record indicates that Dr. Powell was not a B reader at the time he read the June 20, 2001 x-ray. Employer's Exhibit 2.

[12]The administrative law judge stated that "[Dr. Qaisi] opined that [c]laimant has the classic manifestations of 'black lung,' but then testified that in fact he did not know if [c]laimant's symptoms/manifestations were caused by a lung problem or were caused by his well documented congestive heart failure." Decision and Order at 11; Employer's Exhibit 1 (Dr. Qaisi's Deposition at 24, 25).

[13]In finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis, the alj noted that " [the new evidence] also contains the results of two CT scans of the chest." Decision and Order at 10. The June 1, 1999 CT scan provided by Dr.

Further, since none of the newly submitted pulmonary function or arterial blood gas studies of record yielded qualifying[14] values, Director's Exhibit 6; Employer's Exhibit 2, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i) and (b)(2)(ii). Additionally, since there is no evidence of cor pulmonale with right sided congestive heart failure, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.203(b)(2)(iii).

Couch reveals black lung disease and the September 27, 1999 CT scan provided by Dr. Haynes reveals a lung nodule. Director's Exhibit 5. The record also contains Dr. Dao's diagnoses of black lung disease in notes regarding "Follow [Up] CT [Scan]." *Id.*

[14]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (b)(2)(ii).

Finally, we address the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Dr. Westerfield opined that claimant does not suffer from a respiratory impairment. Director's Exhibit 6. Similarly, Dr. Powell noted that there is no evidence of a respiratory impairment. Employer's Exhibit 2. Dr. Qaisi opined that claimant is totally disabled for any gainful employment.[15] Director's Exhibit 21. The administrative law judge permissibly discredited Dr. Qaisi's opinion because it is vague and equivocal.[16] *See Justice*, *supra*; *Campbell*, *supra*. The administrative law judge also permissibly discredited Dr. Qaisi's opinion because it is not supported by the underlying objective evidence.[17] *See Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985). Since it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

Since the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and total disability at 20 C.F.R. §718.204(b), we

[15]The administrative law judge stated that "Dr. Qaisi appears to be of the opinion that it is [c]laimant's congestive heart failure, instead of a pulmonary or respiratory impairment, that has caused his disability." Decision and Order at 12.

[16]The administrative law judge stated that "Dr. Qaisi testified that [claimant] would be totally disabled from his heart condition alone." Decision and Order at 7. The administrative law judge also stated that "[w]hen asked if [claimant's] symptoms could be due entirely to his congestive heart failure from his cardiac system as opposed to any problem associated with his lung system from coal dust exposure, Dr. Qaisi replied, '[i]t could be.'" *Id*.

[17]None of the pulmonary function or arterial blood gas studies of record yielded qualifying values. Director's Exhibits 6, 22; Employer's Exhibit 2.

affirm the administrative law judge's finding that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309 (2000). *See Spese, supra*; *McNew, supra*.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge