BRB No. 98-0519 BLA

| | | |
|---|---|---|
| JOHN P. LUCAS | ) | |
| | ) | |
| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| PEABODY COAL COMPANY | ) | DATE ISSUED:_____ |
| | ) | |
| and | ) | |
| | ) | |
| OLD REPUBLIC INSURANCE COMPANY | ) | |
| | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

John P. Lucas, Dugger, Indiana, *pro se*.

Dana G. Meier (Ice Miller Donadio & Ryan), Indianapolis, Indiana, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order (96-BLA-1416) of Administrative Law Judge Rudolf L. Jansen 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). The instant case involves a duplicate claim filed on September 27, 1993.[1] After crediting claimant with fourteen years of coal mine employment, the administrative law judge found the evidence insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer/Carrier (employer) responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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).

---

[1]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on April 16, 1984. Director's Exhibit 34. The district director denied the claim on June 14, 1984. *Id.* By letter dated August 15, 1984, claimant advised the Department of Labor that he wanted to further pursue his claim. *Id.* By letter dated August 21, 1984, the district director advised claimant that since sixty days had passed, his claim was deemed abandoned subject to reconsideration until June 14, 1985. *Id.* There is no indication that claimant took any further action in regard to his 1984 claim.

Claimant filed a second claim on September 27, 1993. Director's Exhibit 1.

Section 725.309 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). The United States Court of Appeals for the Eighth 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. *Lovilia Coal Co. v. Harvey*, 109 F.3d 445, 21 BLR 2-50 (8th Cir. 1997). Claimant's 1984 claim was denied because he failed to establish either the existence of pneumoconiosis or total disability. Consequently, in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309, the newly submitted evidence must support either a finding of the existence of pneumoconiosis or a finding of total disability.

In his consideration of whether the newly submitted x-ray evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge noted that claimant's February 1, 1994 x-ray was interpreted as positive for pneumoconiosis by Dr. Cappiello, a physician whom the administrative law judge characterized as being dually qualified as a B reader and Board-certified radiologist. Decision and Order at 5, 10; Director's Exhibit 26. The administrative law judge, however, questioned the reliability of Dr. Cappiello's positive interpretation because two subsequent x-rays were interpreted as negative by physicians qualified as B readers. Decision and Order at 10; Director's Exhibit 25; Employer's Exhibits 1, 9, 14, 18.

In *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992), the United States Court of Appeals for the Fourth Circuit held that an administrative law judge may not discredit positive x-ray evidence solely because later x-rays are interpreted as negative. While the administrative law judge's analysis, at first glance, appears to run contrary to *Adkins*, we note that the record does not indicate that Dr. Cappiello is a Board-certified radiologist. The record merely indicates that Dr. Cappiello is qualified as a B reader. *See* Director's Exhibit 26.

Moreover, while a Joint Stipulation does not list Dr. Cappiello as having any special radiological qualifications, it does indicate that Dr. McGraw is dually qualified as a B reader and Board-certified radiologist.[2] Joint Exhibit 1. Dr. McGraw

[2]The record confirms Dr. McGraw's status as a B reader and Board-certified radiologist. While Dr. McGraw's x-ray reports only evidence his B reader status, *see* Director's Exhibit 29; Employer's Exhibits 1, 14, 16, Dr. McGraw testified during a February 19, 1996 deposition that he has been a Board-certified radiologist since

rendered negative interpretations of claimant's August 12, 1994 and September 21, 1995 x-rays.[3] Employer's Exhibits 1, 14. Thus, Dr. Cappiello's positive interpretation of claimant's February 1, 1994 x-ray was not called into question solely because later x-rays were interpreted as negative, but also because later x-rays (August 12, 1994 and September 21, 1995) were interpreted by equally qualified or better qualified physicians as negative for pneumoconiosis. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Since the record does not contain any biopsy or autopsy evidence, the administrative law judge properly found that claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 10. 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, the administrative law judge properly found that claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3). *Id.*

---

1976. Employer's Exhibit 25 at 4.

[3]Dr. Goodman, a B reader, also rendered a negative interpretation of claimant's August 12, 1994 x-ray, while Dr. Stafford, a B reader, rendered a negative interpretation of claimant's September 21, 1995 x-ray. Employer's Exhibits 9, 18.

In his consideration of whether the newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge credited the opinions of Drs. Myers and Tuteur that claimant did not suffer from pneumoconiosis over the contrary opinions of Drs. Combs and Cohen. Decision and Order at 9-10; Director's Exhibit 10; Employer's Exhibits 14, 20, 21, 26, 27; Claimant's Exhibit 1. The administrative law judge discredited the opinions of Drs. Combs and Cohen because they relied upon inaccurate smoking histories.[4] Decision and Order at 10-11. The administrative law judge, however, erred in not rendering a specific finding regarding the length of claimant's smoking history.[5] *See*

[4]In a November 9, 1993 report, Dr. Combs noted that claimant smoked a half a pack of cigarettes a day from 1943 until June of 1993. Director's Exhibit 10. In a February 5, 1997 report, Dr. Cohen noted at one point that claimant had smoked 1-2 cigarettes a day for 50 years before stopping in 1994. Claimant's Exhibit 1. Dr. Cohen, however, in addressing the etiology of claimant's lung disease, relied upon a "5-25 pack year exposure to tobacco." *Id.*

[5]Although the administrative law judge stated that he believed that claimant's smoking history was greater than one-half pack per day, he provided no basis for this opinion. Decision and Order at 10. The administrative law judge merely noted that the treatment notes of Drs. Ratliff and Dukes show that claimant admitted to no more than one pack per day. *Id.* Moreover, while the administrative law judge found

*generally Bowman v. Director, OWCP*, 7 BLR 1-718 (1985). Moreover, even if Drs. Combs and Cohen had a somewhat inaccurate understanding of the extent of claimant's smoking history, the administrative law judge failed to explain how this misunderstanding undermined their respective diagnoses of pneumoconiosis.[6] 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). We, therefore vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4) and remand the case for further consideration.

---

that the smoking histories recorded by claimant's treating physicians were more credible than claimant's "patently false" testimony, he acknowledged that even these histories were "totally inconsistent and range from one to two cigarettes per day for 50 years to one pack per day for 50 years." *Id.* at 11.

[6]During a February 25, 1997 deposition, Dr. Tuteur stated that the cigarette smoking history was "irrelevant as to the possibility of coal workers' pneumoconiosis." Employer's Exhibit 27 at 23.

Turning to the issue of total disability, the administrative law judge properly questioned the validity of claimant's qualifying June 17, 1993, June 22, 1993 and February 1, 1994 pulmonary function studies inasmuch as they were invalidated by two pulmonary specialists, Drs. Tuteur and Renn.[7] *See Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order 11-12. We further note that Drs. Tuteur and Renn also invalidated claimant's most recent pulmonary function study conducted on December 12, 1995.[8] Employer's Exhibits 23, 24.

The administrative law judge, however, erred in his consideration of claimant's October 15, 1993 and September 21, 1995 pulmonary function studies. Although Dr. Renn invalidated Dr. Combs' qualifying October 15, 1993 pulmonary function study, the administrative law judge failed to address the fact that Dr. Tuteur, an equally qualified physician, validated the study.[9] Director's Exhibits 6, 29. Moreover, although Dr. Renn invalidated claimant's qualifying September 21, 1995 pulmonary function study, Employer's Exhibits 14, 15, the administrative law judge failed to provide a basis for crediting Dr. Renn's opinion over that of the administering physician, Dr. Myers. Dr. Myers, like Dr. Renn, is Board-certified in Internal Medicine and Pulmonary Disease. Employer's Exhibit 14. We, therefore, vacate the administrative law judge's finding that the newly submitted pulmonary function study evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1).

---

[7]Drs. Dukes and Rink administered the June 17, 1993 and June 22, 1993 pulmonary function studies, Employer's Exhibits 3, 6, while Dr. Combs administered the February 1, 1994 pulmonary function study. Director's Exhibit 8. Drs. Tuteur and Renn invalidated each of these studies. Director's Exhibits 9, 23, 28; Employer's Exhibits 10-12. Dr. Tuteur is Board-certified in Internal Medicine and Pulmonary Disease. Employer's Exhibit 26. Although Dr. Renn's qualifications are not found in the record, the parties stipulated to his Board-certification in Internal Medicine and Pulmonary Disease. *See* Joint Exhibit 1. The qualifications of Drs. Dukes, Rink and Combs are not found in the record.

[8]The administrative law judge also noted that claimant's December 12, 1995 pulmonary function study did not include the tracings required by the quality standards. Decision and Order at 12; Claimant's Exhibit 1.

[9]Dr. Long also invalidated the October 15, 1993 pulmonary function study. Director's Exhibit 7. Although the parties stipulated to Dr. Long's Board-certification in Internal Medicine and Pulmonary Disease, Joint Exhibit 1, the record indicates that Dr. Long is merely Board-eligible in Internal Medicine. *See* Director's Exhibit 7.

In his consideration of the newly submitted arterial blood gas study evidence, the administrative law judge noted that while a June 16, 1993 arterial blood gas study is qualifying, three subsequent studies conducted on October 15, 1993, April 24, 1995 and September 21, 1995 are non-qualifying. Decision and Order at 12; Director's Exhibit 11; Employer's Exhibits 3, 14, 19. The administrative law judge, therefore, found that the newly submitted arterial blood gas study evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(2). Decision and Order at 12. Inasmuch as this finding is supported by substantial evidence, it is affirmed.

Inasmuch as there is no evidence of cor pulmonale with right sided congestive heart failure, the administrative law judge properly found the evidence insufficient to establish total disability pursuant to C.F.R. §718.204(c)(3) . Decision and Order at 12.

Finally, in finding the newly submitted medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4), the administrative law judge credited the opinions of Drs. Myers and Tuteur that claimant did not suffer from any "impairment due to coal mine employment." Decision and Order at 12. The administrative law judge improperly combined his findings regarding the issue of total disability pursuant to 20 C.F.R. §718.204(c)(4) with the issue of the etiology of claimant's total disability pursuant to 20 C.F.R. §718.204(b). The etiology of a claimant's disability is properly addressed at 20 C.F.R. §718.204(b), not under 20 C.F.R. §718.204(c)(4). In the instant case, Dr. Myers opined that claimant's emphysema caused a moderate impairment. Employer's Exhibit 14. Dr. Tuteur opined that claimant's lung disease "produced physical limitations of sufficient severity to prevent his continued employment in the coal mine industry." Employer's Exhibit 20. Inasmuch as these opinions, if credited, could support a finding of total disability, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c)(4), and remand the case for further consideration.

Should the administrative law judge, on remand, find the newly submitted evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309, he must consider claimant's 1993 claim on the merits, based on a weighing of all the evidence of record. *See Shupink v. LTV Steel Corp.*, 17 BLR 1-24 (1992).

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

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge