

BRB No. 92-0572 BLA

JOE REYNOLDS (Deceased))
)
Claimant-Petitioner)
)

v.

) DATE ISSUED: _____)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order of Edward J. Murty, Jr., Administrative
Law Judge, United States Department of Labor.

Joe Reynolds, Dryden, Virginia, *pro se*.

Before: STAGE, Chief Administrative Appeals Judge, BROWN and
DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (91-BLA-1474) of Administrative Law Judge Edward J. Murty, Jr. 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*. Claimant filed a claim on August 9, 1984, which was denied on January 7, 1985. Claimant filed a second claim on February 27, 1986 which the administrative law judge considered pursuant to 20 C.F.R. Part 718. The administrative law judge credited claimant with more than ten years of coal mine employment and determined that claimant did not establish the existence of pneumoconiosis or that he was totally disabled. The administrative law judge also found that claimant did not establish the change of condition necessary to reopen his claim. Accordingly, benefits were denied. Claimant appeals this denial. The Director, Office of Workers' Compensation

Programs (the Director), has chosen not to respond in this case.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, the administrative law judge considered all of the evidence of record pursuant to 20 C.F.R. Part 718, determined that claimant failed to establish the existence of pneumoconiosis or that he was totally disabled, and therefore concluded that claimant failed to establish a "change of condition necessary to allow him to reopen his claim." Decision and Order at 4. However, as this case involves a duplicate claim issue, the administrative law judge was first required to consider the evidence submitted subsequent to the denial of the first claim pursuant to 20 C.F.R. §725.309 in order to determine if a material change in conditions had been established. After reviewing the evidence of record, the administrative law judge erred in finding that claimant did not establish a material change in conditions as there is x-ray evidence and medical opinion evidence of pneumoconiosis and qualifying blood gas study evidence, all of which was developed after the prior denial, which could change the prior administrative result. See Director's Exhibits 5, 8, 13, 15, 18, 30, 33, 34; *Shupink v. LTV Steel Co.*, 17 BLR 1-24 (1992); *Rice v. Sahara Coal Co., Inc.*, 15 BLR 1-19 (1990). As a result, the administrative law judge's finding that claimant failed to establish a material change in conditions is vacated and the case is remanded for consideration of the evidence pursuant to 20 C.F.R. §725.309. If, on remand, the administrative law judge finds a material change in conditions established, he must again consider the claim pursuant to 20 C.F.R. Part 718. In light of this fact, we will now address the administrative law judge's findings at 20 C.F.R. Part 718.

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered the x-ray evidence of record, which consists of thirteen interpretations of seven x-rays, only three of which are positive for the existence of pneumoconiosis. See Director's Exhibits 7, 8, 13, 15, 18, 33-37. The administrative law judge permissibly found the weight of the x-ray evidence to be negative for pneumoconiosis. See Decision and Order at 3; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). As a result, the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. is affirmed.

There is no autopsy or biopsy evidence in the record in this case, thus the existence of pneumoconiosis is not established pursuant to 20 C.F.R. §718.202(a)(2). Also, the existence of pneumoconiosis is not established pursuant to 20 C.F.R. §718.202(a)(3) as there are no presumptions that apply in this case.¹

¹The presumption at 20 C.F.R. §718.304 is not applicable as there is no evidence that the deceased miner suffered from complicated pneumoconiosis. The fifteen

year presumption contained in 20 C.F.R. §718.305 is inapplicable here as claimant's application for benefits was filed after January 1, 1982. 20 C.F.R. §718.305(e). The presumption at 20 C.F.R. §718.306 applies only to survivor's claims filed prior to June 30, 1982 wherein the miner died on or before March 1, 1978. 20 C.F.R. §718.306(a).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions of record, which consist of five medical reports (four of which are dated after the January 7, 1985 denial) and a death certificate. See Director's Exhibits 5, 13, 15, 30, 33, 40. Four of the reports and the death certificate diagnosed pneumoconiosis. See Director's Exhibits 5, 13, 15, 30, 33. The administrative law judge stated that the x-ray interpretations of examining physicians "cannot logically change the result of the weighing under subsection (a)(1)," and erroneously failed to consider the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). See Decision and Order at 3; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). As a result, the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4) is vacated, and the case is remanded for further consideration of the evidence relevant to this issue.

The administrative law judge next considered the evidence pursuant to 20 C.F.R. §718.204(c)(1) and properly found that none of the pulmonary function studies of record yielded qualifying results. See Director's Exhibits 4, 13, 16. As a result, the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c)(1) is affirmed.

Pursuant to 718.204(c)(2), the administrative law judge considered the blood gas studies of record, which consist of five blood gas studies, two of which yielded qualifying results. See Director's Exhibits 6, 13, 17, 34. The administrative law judge, however, erroneously found that none of the blood gas studies yielded qualifying results. See Director's Exhibit 34; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). As a result, the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c)(2) is vacated, and the case is remanded for the administrative law judge to properly weigh the evidence on this issue.²

The administrative law judge next considered the medical opinion evidence of record pursuant to 20 C.F.R. §718.204(c)(4). Of the five medical reports in the record, three addressed the degree of claimant's disability. See Director's Exhibits 5, 13, 15, 33, 40. Two of these three found that claimant was not totally disabled. See Director's Exhibits 15, 40. The administrative law judge permissibly assigned the greatest weight to the record review of Dr. Spagnolo, which found that claimant is not totally disabled, as he is highly qualified and because his findings are in accord with the objective data of record. See Decision and Order at 4; Director's Exhibit 40; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). As a result, the administrative law

²Claimant did not establish total disability pursuant to 20 C.F.R. §718.204(c)(3), as there is no evidence of cor pulmonale with right sided congestive heart failure.

judge's finding that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(c)(4) is affirmed as it is supported by substantial evidence.

Thus, the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1)-(3) and 718.204(c)(1), (3), and (4) are affirmed. Further, the administrative law judge's remaining findings are vacated and the case is remanded for the administrative law judge to reconsider his findings pursuant to 20 C.F.R. §§725.309, 718.202(a)(4) and 718.204(c)(2).

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

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge