BRB No. 91-1371 BLA

FREELAND A. VARNEY )
)
Claimant-Petitioner )
)
v. )
)
PEABODY COAL COMPANY )
)
and )
)
OLD REPUBLIC INSURANCE ) DATE ISSUED:
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 G. Marvin Bober, Administrative Law Judge, United States Department of Labor.

Barbara E. Holmes (Blaufeld & Schiller), Pittsburgh, Pennsylvania, for claimant.

Michael J. Reidy (Squire, Sanders & Dempsey), Cleveland, Ohio, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (87-BLA-2323) of Administrative Law Judge G. Marvin Bober 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). This case involves a duplicate claim. Claimant filed his first claim for benefits on September 5, 1979. Upon considering this claim pursuant to the regulations found at 20 C.F.R. Part 727, Administrative Law Judge V. M. McElroy found that claimant established thirteen and one-half years of coal mine employment and invocation of the interim presumption pursuant to 20

C.F.R. §727.203(a)(4). The administrative law judge then found that employer established rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(4), and that claimant failed to establish entitlement pursuant to 20 C.F.R. Part 718 or 20 C.F.R. Part 410. Accordingly, benefits were denied. No appeal was taken from this denial of benefits. Claimant filed the present claim for benefits on June 2, 1986 and Administrative Law Judge G. Marvin Bober considered it pursuant to 20 C.F.R. Part 718. Upon considering the claim as a duplicate claim pursuant to 20 C.F.R. §725.309(d), the administrative law judge considered the newly submitted evidence of record and found that claimant failed to establish a material change in conditions. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in finding that claimant failed to establish a material change in conditions pursuant to Section 725.309(d). Employer responds in support of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), has chosen not to respond to this appeal.

The Board's scope of review is defined by statute. The administrative law judge's findings of fact and conclusions of law must be affirmed if they are supported by substantial evidence, are rational, and are 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).

As claimant contends on appeal, pursuant to Section 725.309(d), a second claim must be denied as a duplicate claim unless claimant establishes a material change in conditions. *See* 20 C.F.R. §725.309(d). In determining whether claimant has established a material change in conditions, the administrative law judge must consider the relevant and probative new evidence in light of the previous denial to determine if there is a reasonable possibility that the evidence, if credited on the merits, could change the prior administrative result. This determination by the administrative law judge is to be made without weighing the new evidence supportive of a finding of a material change against any contrary evidence. If the administrative law judge finds that claimant has established a material change in conditions, claimant is entitled to have his new claim considered on the merits. *See Shupink v. LTV Steel Co.*, 17 BLR 1-24 (1992). In the present claim, the administrative law judge considered the newly submitted evidence and determined that claimant failed to establish a material change in conditions pursuant to Section 725.309(d). *See* Decision and Order at 8-9. However, the record contains medical opinion evidence which, if fully credited, could establish the existence of pneumoconiosis. *See* Director's Exhibit 7. Dr. Frank T. Varney, in a report dated May 10, 1985, stated that he read an x-ray as showing UICC category 1/2 pneumoconiosis. *See* Director's Exhibit 7. Dr. Varney further stated that claimant is

totally and permanently disabled to do the manual work of coal mining because of his chronic lung disease. *See* Director's Exhibit 7. The record also contains two qualifying pulmonary function studies which, if fully credited, could establish total disability. *See* Director's Exhibits 6, 7. As the record contains evidence which, if fully credited, could change the prior administrative result, the administrative law judge's finding that claimant failed to establish a material change in conditions is in error. *See Shupink*, *supra*. As a result, the administrative law judge's finding that claimant failed to establish a material change in conditions pursuant to Section 725.309(d) is reversed and the case is remanded to the administrative law judge for consideration of the merits of the claim, and all of the relevant evidence of record, pursuant to 20 C.F.R. Part 718. *See Shupink*, *supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge