BRB No. 94-2478 BLA

MILLARD MONTGOMERY )
)
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 Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

John C. Collins (Collins, Smith & Allen), Salyersville, Kentucky, for claimant.

Jill M. Otte (Thomas S. Williamson, Jr., Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order (92-BLA-1338) of Administrative Law Judge Richard E. Huddleston denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal

[1]Claimant is Millard Montgomery, the miner, whose first claim for benefits, filed on January 28, 1981, was denied on August 6, 1981 because claimant failed to

establish the existence of pneumoconiosis and total respiratory disability. Director's Exhibit 25. Claimant filed the present claim on April 10, 1990, which was treated as a duplicate claim pursuant to 20 C.F.R. §725.309(d). Director's Exhibits 4, 4A. Claimant filed a third claim on October 29, 1990, which merged with the present claim. Director's Exhibit 6; *see* 20 C.F.R. §725.309(d).

Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). The administrative law judge first determined that claimant established a material change in conditions pursuant to Section 725.309(d) and eleven years of qualifying coal mine employment. The administrative law judge considered the claim pursuant to 20 C.F.R. Part 718 and found the existence of pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b). The administrative law judge found, however, that claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in his treatment of the medical evidence pursuant to Sections 718.202(a)(3) and 718.204(c)(1) and (4). The Director, Office of Workers' Compensation Programs, (the Director) responds, urging affirmance.[2]

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

At Section 725.309(d), the administrative law judge applied *Spese v. Peabody Coal Co.*, 11 BLR 1-174, 1-176 (1988), which held that a material change in conditions may be established by evidence which, if fully credited, presents a reasonable possibility of changing the prior administrative result. The administrative law judge then credited a positive x-ray interpretation and two medical opinions and found that claimant established a material change in conditions pursuant to Section 725.309(d). Decision and Order at 4.

[2]The administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (2) and that claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c)(2) and (3) are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Subsequent to the issuance of the administrative law judge's Decision and Order, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this claim arises, held in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), that pursuant to Section 725.309(d), the 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. If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change in conditions. *Ross*, 42 F.3d at 997-8; 19 BLR at 2-20.

While the initial claim in this case was denied because claimant had failed to establish the existence of pneumoconiosis and total respiratory disability, and the administrative law judge found the existence of pneumoconiosis established in this duplicate claim, thus meeting the *Ross* standard, the administrative law judge's finding at Section 718.202(a)(4) is based on application of the true-doubt rule. Subsequent to the administrative law judge's decision, the United States Supreme Court held that the true-doubt rule violates Section 7(c) of the Administrative Procedure Act and may not be applied in weighing the evidence to aid a claimant in meeting his burden of proof. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, U.S. , 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom.*, *Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Thus, we vacate the administrative law judge's findings pursuant to Section 718.202(a)(4) remand this case for reconsideration in light of *Ross*, *supra*.[3]

Pursuant to Section 718.304, claimant contends that the administrative law judge erroneously failed to find that Dr. Phillip's 2/2 interpretation of an x-ray dated June 10, 1981, Director's Exhibit 10, was a finding of complicated pneumoconiosis. Claimant's Brief at 3. This contention is without merit because Dr. Phillips did not find the existence of large opacities as required by Section 718.304(a). See *Handy v. Director, OWCP*, 16 BLR 1-73 (1990); *cf*. *Wolf Creek Collieries v Robinson*, 872

[3]Pursuant to Section 718.202(a)(4), the administrative law judge erroneously gave Dr. Potter's opinion, Director's Exhibit 25, less weight because he found that Dr. Potter diagnosed pneumoconiosis on the basis of a positive x-ray interpretation when he had determined that the x-ray evidence is negative for the existence of pneumoconiosis. Decision and Order at 10; *see Taylor v. Director, OWCP*, 9 BLR 1-22 (1986). The administrative law judge also erred in finding Dr. Sundaram's opinion, Claimant's Exhibit 1, that claimant has coal workers' pneumoconiosis to be equivocal, Decision and Order at 10, inasmuch as the doctor clearly stated that claimant's examination and history supported such a diagnosis. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

F.2d 1264, 12 BLR 2-259 (6th Cir. 1989). Thus, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(3).

Regarding Section 718.204(c), claimant first contends that the administrative law judge erred in weighing the pulmonary function study evidence of record pursuant to Section 718.204(c)(1). Claimant's Brief at 2-3. The record contains six pulmonary function studies, five of which, including the two most recent studies, produced non-qualifying results. *See* Director's Exhibits 10, 16, 19, 25. The administrative law judge permissibly found that the weight of the pulmonary function study evidence does not support a finding of total disability. *See* Decision and Order at 13; *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990). Therefore, we affirm the administrative law judge's finding that claimant failed to establish total disability pursuant to Section 718.204(c)(1).

Claimant next contends that the administrative law judge erred in weighing the medical opinion evidence of record pursuant to Section 718.204(c)(4). Claimant's Brief at 3-4. While the administrative law judge correctly stated that Dr. Salon did not directly indicate whether claimant is totally disabled, Decision and Order at 13, Dr. Salon described several physical limitations under the "Medical Assessment" portion of his June 10, 1981 report. Director's Exhibit 25. This evidence, when considered in conjunction with the exertional requirements of claimant's former coal mine employment, may be found sufficient to support a finding of total disability.[4] *See Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc)*; *DeFelice v. Consolidation Coal Co.*, 5 BLR 1-275 (1982). Therefore, we vacate the administrative law judge's treatment of Dr. Salon's opinion.

The administrative law judge discredited the report of Dr. Sundaram, who stated that claimant is unable to perform his usual coal mine employment on the basis that Dr. Sundaram did not include any objective test results to support his conclusion. Decision and Order at 13. The record contains reports from Dr. Sundaram dated September 5, 6, and 21, 1990 and September 24, 1993. Director's Exhibit 22; Claimant's Exhibit 1. The record also contains a qualifying pulmonary function study dated September 21, 1990 which was attached to Dr. Sundaram's

[4]The administrative law judge initially must determine whether the statements made in Dr. Salon's report constitute an assessment of physical limitations, which must be compared to the exertional requirements of claimant's usual coal mine employment, or are merely a narrative of claimant's symptoms, which are insufficient to establish total disability pursuant to Section 718.204(c)(4). *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988).

September 21, 1990 report. Director's Exhibit 22. While the pulmonary function study does not indicate that it was performed by Dr. Sundaram, the record contains a letter from claimant's attorney which mentions a pulmonary function study performed by Dr. Sundaram on September 21, 1990. *See* Director's Exhibit 15. Thus, the administrative law judge erred in according Dr. Sundaram's opinion less weight because he did not include objective evidence to support his conclusion.

Similarly, the administrative law judge erred in according less weight to the opinions of Drs. Wright and Fritzhand, Director's Exhibits 10, 25, on the basis that their findings that claimant is totally disabled are not supported by their objective studies. Decision and Order at 13; *see Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984). Therefore, we vacate the administrative law judge's findings pursuant to Section 718.204(c)(4) and remand this case for him to reconsider the medical opinion evidence pursuant to Section 718.204(c)(4).[5]

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.

ROY P. SMITH
Administrative Appeals Judge

[5]If he finds total respiratory disability established on remand pursuant to Section 718.204(c)(4), the administrative law judge must determine whether the record contains contrary probative evidence. If so, the administrative law judge must assign this evidence appropriate weight and determine whether it outweighs the evidence supportive of a finding of total respiratory disability. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). If total respiratory disability is established at Section 718.204(c), the administrative law judge must then make a causation finding pursuant to Section 718.204(b).

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge