BRB No. 95-1575 BLA

CHARLES F. KEENE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
ISLAND CREEK COAL COMPANY	)	
	)	
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 Reno E. Bonfanti, Administrative Law Judge, United States Department of Labor.

Charles F. Keene, Jolo, West Virginia, *pro se*.

Ann B. Rembrandt (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order

[1] Claimant is Charles F. Keene, the miner, whose initial claim for benefits, filed on December 18, 1985, was denied on June 19, 1989. Director's Exhibit 39. Claimant filed the present application for benefits on November 3, 1992, which was granted by the district director on June 30, 1993. Director's Exhibits 1, 30. Employer contested this finding and requested a hearing. Director's Exhibits 27, 42. Tim White, a

(93-BLA-1696) of Administrative Law Judge Reno E. Bonfanti 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 administrative law judge found a material change in conditions established pursuant to 20 C.F.R. §725.309 and credited claimant with twenty-one years of coal mine employment but concluded that the evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §§718.202(a). Accordingly, he denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), 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 to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co*., 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is 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).

To establish entitlement to benefits under 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment.[2] *See* 20 C.F.R. §§718.3,

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benefits counselor with Stone Mountain Health Services of Oakwood, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. White is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2] In the first claim, employer conceded claimant's total disability, and the prior administrative law judge accepted this concession. [1988] Hearing Transcript at 6;

718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

[1989] Decision and Order at 7. In this claim, employer also concedes total respiratory disability. [1994] Hearing Transcript at 11.

Initially, we affirm the administrative law judge's finding of a material change in conditions based on a newly submitted positive x-ray reading.[3] *See Shupink v. LTV Steel Co*., 17 BLR 1-24 (1992); Director's Exhibit 16. The administrative law judge's finding of twenty-one years of coal mine employment is also affirmed as supported by substantial evidence. Director's Exhibit 5; [1994] Hearing Transcript at 12.

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge adopted the prior administrative law judge's description of the x-ray evidence submitted with

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[3] Subsequent to the issuance of the administrative law judge's Decision and Order, the United States Court of Appeals for the Fourth Circuit adopted, pursuant to Section 725.309, a standard which requires a claimant to establish either that the miner did not have pneumoconiosis at the time of the first application for benefits but has since contracted it and become totally disabled by it or that the miner's disease has progressed to the point of total disability although it was not totally disabling at the time of the
miner's first application. *Lisa Lee Mines v. Director, OWCP* [Rutter], 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *reh'g granted en banc*, No. 94-2523 (November 16, 1995). Because the Fourth Circuit has granted a motion for *en banc* reconsideration of the decision in *Rutter*, effectively vacating the previous panel judgment and opinion, we will apply the *Shupink* standard in this case.

the initial claim, *see* n.1, and then considered the twenty-eight newly submitted readings of six x-ray films, one of which was positive. Decision and Order at 3. Based on the weight of the new x-ray evidence and the qualifications of the readers, the administrative law judge found the x-ray evidence to be negative for pneumoconiosis. Decision and Order at 6. However, he overlooked six newly submitted positive interpretations by qualified readers.[4] Director's Exhibit 39 at 12-22. Because the administrative law judge failed to weigh these readings and it is unclear whether he again weighed those from claimant's prior claim along with the new readings, *see Shupink*, *supra*, we vacate his finding at Section 718.202(a)(1).

Pursuant to Sections 718.202(a)(2) and (3), the administrative law judge correctly found that the record contains no biopsy evidence and that the presumptions at Sections 718.304, 718.305, and 718.306 are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. Decision and Order at 6; *see* 20 C.F.R. §§718.304, 718.305, 718.306. We therefore affirm these findings.

Pursuant to Section 718.202(a)(4), the administrative law judge adopted the prior administrative law judge's description of the prior medical opinion evidence, then considered the new medical opinions and found that none diagnosed pneumoconiosis. Decision and Order at 8. The administrative law judge accorded "great weight" to Dr. Dahhan's opinion that claimant did not suffer from pneumoconiosis based on his superior qualifications, and concluded that the new opinions "lend support to [the administrative law judge's] finding in the prior determination that the probative and persuasive medical opinion reports are those which concluded that Claimant does not have pneumoconiosis." Decision and Order

[4] Dr. Fisher, a Board-certified radiologist and B-reader, read the February 17, 1988 film as 1/1; Drs. Cappiello and Aycoth, both B-readers, read the same film as 1/0. Director's Exhibit 39. Drs. Cappiello and Aycoth interpreted the August 15, 1989 film as 1/0, while Dr. Sutherland, whose qualifications are not indicated, read the same film as 2/3. *Id*. Although placed with the exhibits from claimant's prior claim, these readings were twice submitted as new evidence under cover letters dated June 25 and October 22, 1990. Director's Exhibit 39.

at 9.

Again, it is unclear whether the administrative law judge actually weighed the five medical opinions submitted with claimant's prior claim, two of which diagnosed pneumoconiosis, along with the new opinions.[5] *See Shupink*, *supra*; Director's Exhibit 39. Furthermore, Dr. Dahhan purports to rule out a diagnosis of coal workers' pneumoconiosis based in part on the purely obstructive nature of claimant's ventilatory impairment. *See Warth v. Southern Ohio Coal Co*., 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995) (administrative law judge erred by relying on physician's opinion that claimant did not have pneumoconiosis where physician based opinion on erroneous assumption that obstructive disorders cannot be caused by coal mine employment); Director's Exhibit 36; Employer's Exhibit 1 at 10-11. Therefore, we vacate the administrative law judge's finding at Section 718.202(a)(4) and instruct him on remand to weigh all the medical opinions, *see Shupink*, *supra*, in light of *Warth*, *supra*. *See Gorzalka v. Big Horn Coal Co*., 16 BLR 1-48 (1990)(in determining whether pneumoconiosis is established, administrative law judge need not distinguish between portion of claimant's disease attributable to coal dust exposure and that attributable to other non-mine related causes).

[5] Dr. Rasmussen diagnosed coal workers' pneumoconiosis, and Dr. Fielder diagnosed moderately severe chronic obstructive pulmonary disease related to coal dust exposure. Director's Exhibit 39.

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

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge