BRB No. 99-1108 BLA

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| EARL SALYERS, JR. | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| SHAMROCK COAL COMPANY, INCORPORATED | ) | DATE ISSUED: |
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| | ) | |
| and | ) | |
| | ) | |
| SUN COAL COMPANY, INCORPORATED | ) | |
| | ) | |
| | ) | |
| 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 Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Harold Rader (Law Offices of Neville Smith), Manchester, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (98-BLA-1164) of Administrative Law Judge Donald W. Mosser 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 April 5, 1994.[1] In the initial decision, Administrative Law Judge Richard E. Huddleston found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, Judge Huddleston denied benefits. By Decision and Order dated June 26, 1997, the Board affirmed Judge Huddleston's finding that the evidence was insufficient to establish a

[1]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits with the Social Security Administration (SSA) on November 17, 1972. Director's Exhibit 22. The SSA denied the claim on October 15, 1973 and June 11, 1979. *Id.* The Department of Labor (DOL) denied the claim on November 28, 1979 and February 22, 1980. *Id.*

Claimant filed a second claim on October 7, 1986. Director's Exhibit 23. In a Proposed Decision and Order of No Material Change in Condition and Denial of Claim dated August 1, 1988, the district director denied benefits. *Id.*

Claimant filed a third claim on May 29, 1992. Director's Exhibit 24. The district director denied the claim on November 5, 1992. *Id.* On November 5, 1993, claimant filed a letter dated November 3, 1993, informing the DOL of his appointment of counsel. *Id.*

Claimant filed a fourth claim on April 5, 1994. Director's Exhibit 1.

material change in conditions pursuant to 20 C.F.R. §725.309. *Salyers v. Shamrock Coal Co*., BRB No. 96-1330 BLA (June 26, 1997) (unpublished). The Board, therefore, affirmed Judge Huddleston's denial of benefits.

Claimant subsequently requested modification of his denied claim. Finding that claimant failed to demonstrate a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310, Administrative Law Judge Donald W. Mosser (the administrative law judge) denied claimant's request for modification. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Claimant also contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4). 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.

The Board 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).

The Board has held that in considering whether a claimant has established a change in conditions pursuant to 20 C.F.R. §725.310, an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). In the prior decision, Judge Huddleston denied benefits because claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309,[2] a finding subsequently affirmed by the

[2]Because Judge Huddleston found that claimant's 1986 claim remained viable, he considered all of the evidence submitted since the denial of claimant's 1972 claim in his consideration of whether the evidence was sufficient to establish a

Board. Consequently, the issue properly before the administrative law judge was whether the newly submitted evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309.

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 Sixth 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. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Claimant's 1972 claim was denied because claimant failed to establish the existence of pneumoconiosis or that he was totally disabled due to pneumoconiosis. Director's Exhibit 22. Consequently, in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309, the newly submitted evidence must support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or a finding of total disability pursuant to 20 C.F.R. §718.204(c). Thus, in order to establish a change in conditions pursuant to 20 C.F.R. §725.310, the newly submitted evidence must support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or a finding of total disability pursuant to 20 C.F.R. §718.204(c).

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material change in conditions pursuant to 20 C.F.R. §725.309. *See* Director's Exhibit 36; *see also Salyers v. Shamrock Coal Co*., BRB No. 96-1330 BLA (June 26, 1997) (unpublished).

Claimant argues that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). In his consideration of whether the newly submitted x-ray evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge found that there were no newly submitted x-ray interpretations supportive of a finding of pneumoconiosis. Decision and Order at 6-7. The administrative law judge erred in not addressing the significance of Dr. Bushey's positive interpretation of claimant's January 23, 1998 x-ray. *See* Director's Exhibit 46. Drs. Wiot and Spitz, however, interpreted claimant's January 23, 1998 x-ray as negative for pneumoconiosis. Director's Exhibits 47, 49. Inasmuch as the administrative law judge properly found that the interpretations rendered by Drs. Wiot and Spitz were entitled to the greatest weight based upon their superior radiological qualifications,[3] the administrative law judge's failure to address the significance of Dr. Bushey's x-ray interpretation constitutes harmless error. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). The administrative law judge also noted that Dr. Dahhan, a B reader, interpreted claimant's February 23, 1999 x-ray as negative for pneumoconiosis. Decision and Order at 5-7; Employer's Exhibit 1. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Inasmuch as no party challenges the administrative law judge's finding that

[3]In determining whether the newly submitted x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge properly accorded greater weight to the interpretations rendered by B readers and/or Board-certified radiologists. *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 6-7. Drs. Wiot and Spitz are dually qualified as B readers and Board-certified radiologists. Director's Exhibits 23, 47, 49. Dr. Bushey's radiological qualifications are not found in the record.

the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In his consideration of whether the newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge found that Dr. Dahhan's opinion that claimant did not suffer from pneumoconiosis was entitled to the greatest weight based upon Dr. Dahhan's superior qualifications.[4] *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order at 7. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Inasmuch as no party challenges the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1), (c)(2) and (c)(3), these findings are affirmed. *Skrack*, *supra*.

Claimant argues that the administrative law judge erred in finding that the medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4). The administrative law judge found that Dr. Dahhan's opinion that claimant retained the respiratory capacity to continue his previous coal mining work was supported by the objective evidence and was uncontradicted. Decision and Order at 9; Employer's Exhibit 1. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly

[4]Dr. Dahhan is Board-certified in Internal Medicine and Pulmonary Disease. Employer's Exhibit 1. Although the administrative law judge erred in not addressing the significance of Dr. Bushey's diagnosis of pneumoconiosis, *see* Director's Exhibit 46, the administrative law judge's error is harmless inasmuch as Dr. Bushey's qualifications are not found in the record. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

submitted medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4).

Inasmuch as the administrative law judge properly found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4), we affirm the administrative law judge's finding that claimant failed to establish a change in conditions pursuant to 20 C.F.R. §725.310.

Inasmuch as no party challenges the administrative law judge's finding that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310, this finding is affirmed. *Skrack*, *supra*.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge