BRB No. 00-0991 BLA

HARRY E. MOORE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
U.S. STEEL MINING COMPANY	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Harry E. Moore, Bluefield, Virginia, *pro se*.

Howard G. Salisbury, Jr. (Kay Casto & Chaney PLLC), Charleston, West Virginia, for employer.

Rita Roppolo (Howard M. Radzely, Acting 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: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (1998-BLA-00585) of Administrative Law Judge Daniel F. Sutton awarding 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).[1] The administrative law judge adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718 (2000).[2] The administrative law judge reviewed the evidence submitted

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant filed his initial claim for benefits on July 26, 1978. This claim was denied by Administrative Law Judge Ronald T. Osborn and the decision ultimately affirmed by the Board. *Moore v. United States Steek Corp.*, BRB No. 87-3009 BLA (Apr. 28, 1989)(unpub.). Decision and Order at 2; Director's Exhibit 32. Claimant's subsequent request for modification was denied. *Id*. Claimant filed duplicate claims on September 27, 1991, March 22, 1993 and January 11, 1995, which were denied by the district director. *Id*.; Director's Exhibits 29-31. No further action was taken on these claims. The instant claim was filed on March 3, 1997. *Id*.; Director's Exhibit 1.

subsequent to the previous denial and found that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000) and thus a material change in conditions pursuant to 20 C.F.R. §725.309(d) (1999).[3] The administrative law judge further accepted employer's concession that the miner had thirty-one years of coal mine employment, and based on his review of all of the evidence in the record, found that claimant was totally disabled due to pneumoconiosis pursuant to Sections 718.202(a)(1), (4), 718.203(b) and 718.204(b), (c)(4) (2000). Accordingly, benefits were awarded. On appeal, employer contends that the administrative law judge erred in his determination that claimant is totally disabled due to pneumoconiosis pursuant to Section 718.204(b), (c) (2000) and in his determination that claimant demonstrated a material change in conditions pursuant to Section 725.309(d) (2000) since the denial of the prior claims.[4] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief on the merits of this appeal.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on April 20, 2001, to which claimant, employer and the Director have responded. Claimant asserts that the regulations at issue will

[3] The amendments to the regulation at 20 C.F.R. §725.309 do not apply to claims, such as this, which were pending on January 19, 2001; rather, the version of this regulation as published in the 1999 Code of Federal Regulations is applicable. *See* 20 C.F.R. §725.2(c), 65 Fed. Reg. 80,057 (2000).

[4] The administrative law judge's finding that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b) (2000) are unchallenged on appeal and are therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6BLR 1-710 (1983).

impact his case and that the claim should not go forward until the lawsuit is resolved. Employer and the Director both assert that the regulations at issue in the lawsuit do not affect the outcome of this case. Based on the briefs submitted by claimant, employer and the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon the Board and may not be disturbed. 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204 (2000). Failure of claimant to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

Employer initially contends that the administrative law judge erred in finding a material change in conditions established pursuant to Section 725.309(d) (1999) on the basis that the administrative law judge erroneously found that claimant established a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c)(4) (2000). Employer's argument is misplaced. In finding a material change in conditions established, the administrative law judge properly considered the newly submitted evidence of record and found the existence of pneumoconiosis established, an element of entitlement which defeated entitlement in the prior case. Decision and Order at 5-10. In its brief herein, employer concedes that "the x-ray evidence preponderates in favor of a diagnosis of pneumoconiosis," but argues that the evidence does not support a finding that claimant is totally disabled by a respiratory impairment. Employer's Brief at 6. In *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *cert denied*, 519 U.S. 1090 (1997), the United States Court of Appeals for the Fourth Circuit held that in order for claimant to establish a material change in conditions, claimant must prove, under all of the probative medical evidence of his condition after the prior denial, at least one of the elements previously adjudicated against him. If a material change in conditions is established, the administrative law judge must then consider whether all of the evidence establishes entitlement to benefits. Inasmuch as claimant had previously failed to establish the existence of pneumoconiosis in his previous claim, employer's contention, that the administrative law judge erred in finding a material change in conditions, is rejected. We, therefore, affirm the administrative law judge's finding that the newly submitted medical evidence is sufficient to

establish a material change in conditions pursuant to Sections 718.202(a) (2000) and 725.309(d) (1999). *Rutter*, *supra*.

Employer next contends that the administrative law judge erred in finding total disability established pursuant to Section 718.204(c)(4) (2000). In addressing the issue of whether the medical opinion evidence was sufficient to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c)(4) (2000), the administrative law judge considered the earlier reports of Drs. Ranavaya, Vasudevan, Michos and Forehand as well as the recent reports of Drs. Jabour and Hippensteel. Decision and Order at 11-12, 15; Director's Exhibits 14, 28-31. The administrative law judge noted that Drs. Ranavaya and Vasudevan had not diagnosed a disabling impairment, Dr. Michos did not address the severity of any impairment, and Dr. Forehand "somewhat equivocally" concluded that claimant's impairment might prevent him from performing his previous coal mine employment.[5] *Id*. The administrative law judge also discussed the more recent conflicting opinions of Dr. Jabour, who concluded that claimant's pneumoconiosis caused a severe impairment which would prevent performance of his usual coal mine employment, and Dr. Hippensteel, who did not diagnose pneumoconiosis and concluded that claimant may be disabled from his non-pulmonary conditions such as obesity, diabetes and heart disease, but should be able to perform his previous coal mine employment. *Id*.

The administrative law judge determined that the evidence established that there has been a progression in claimant's condition in that he established the existence of pneumoconiosis and gave diminished weight to the earlier opinions of Drs. Ranavaya, Vasudevan and Forehand regarding the severity of claimant's respiratory impairment. Decision and Order at 15. In addition, the administrative law judge gave diminished weight to Dr. Hipppensteel's opinion regarding claimant's ability to perform his last coal mine employment because Dr. Hippensteel did not diagnose pneumoconiosis, which the administrative law judge determined led Dr. Hippensteel to conclude that claimant's "work-preclusive impairment was non-pulmonary in origin." *Id*. Having discredited all of the

[5] In summarizing the earlier medical opinions, the administrative law judge noted that Drs. Ranavaya and Vasudevan both diagnosed pneumoconiosis, while Drs. Michos and Forehand concluded that claimant's respiratory symptoms were due to obesity and, in Dr. Michos's opinion, claimant's symptoms were also due to interstitial lung disease of unknown origin. Decision and Order at 11-12.

medical opinion evidence unfavorable to claimant, the administrative law judge then gave "appropriate weight" to the later evidence in light of the progressive nature of pneumoconiosis and greater weight to Dr. Jabour's opinion, which he found was "better reasoned" and "more consistent with the weight of the medical evidence." *Id.* The administrative law judge thus found that the preponderance of the medical opinion evidence was sufficient to establish total disability pursuant to Section 718.204(c)(4) (2000). *Id.*

In his weighing of the medical opinion evidence, the administrative law judge has erroneously accorded less weight to the earlier medical opinions on the "severity of any respiratory or pulmonary impairment" based on his conclusion that "there has been a progression of the Claimant's condition in that he has now established the existence of pneumoconiosis." Decision and Order at 15. Contrary to the administrative law judge's conclusion, the determination that the evidence is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) (2000) does not automatically result in the conclusion that claimant is also suffering from a respiratory or pulmonary impairment pursuant to Section 718.204(c) (2000). *See Jarrell v. C & H Coal Co.*, 9 BLR 1-52 (1986)(Brown, J., concurring and dissenting). X-ray evidence is not necessarily diagnostic of the degree of respiratory impairment, *Webb v. Armco Steel Corp.*, 6 BLR 1-1120 (1984), whereas the regulations have specifically provided for the demonstration of an impairment by blood gas and pulmonary function testing. 20 C.F.R. §718.204(c) (2000); *see Sweet v. Jeddo-Highland Coal Co.*, 7 BLR 1-659 (1985). In fact, the administrative law judge found that none of the pulmonary function studies of record are qualifying and that the mixed results of qualifying and nonqualifying arterial blood gas studies "show no discernable pattern such as progression over the years." Decision and Order at 13-14; *see* 20 C.F.R. §718.204(c)(1)-(2) (2000).

Further, pursuant to Section 718.204(c)(4) (2000), the administrative law judge erroneoulsy accorded less weight to Dr. Hippensteel's opinion "because of his failure to diagnose pneumoconiosis which led him to conclude that the Claimant's work-preclusive impairment is non-pulmonary in origin." Decision and Order at 15. The administrative law judge in this instance has made a factual determination that is not supported by the evidence. Contrary to the administrative law judge's statement, Dr. Hippensteel's report does not indicate that he reached his diagnosis that claimant could perform his usual coal mine employment because claimant did not have pneumoconiosis. The administrative law judge acknowledged that Dr. Hippensteel conducted a physical examination and performed testing which included a chest x-ray, pulmonary function study, blood gas study and an electrocardiogram. Decision and Order at 8. In addition, Dr. Hippensteel reviewed additional medical records and specifically addressed the contrary conclusions reached by Dr. Jabour. Inasmuch as the administrative law judge has mischaracterized Dr. Hippensteel's opinion, his rationale for according the opinion less weight can not be affirmed. *See Hall v. Consolidation Coal Co.*, 6 BLR 1-1306 (1984).

Furthermore, as employer correctly argues, the administrative law judge did not specifically discuss Dr. Jabour's statements in progress notes dated February 16, 1998, December 14, 1998 and May 10, 1999 that claimant suffers from "mild" pneumoconiosis and "mild" impairment. Claimant's Exhibit 1. Consequently, we vacate the administrative law judge's finding of total disability and remand this case to the administrative law judge to reconsider the medical opinions and determine if claimant suffers from a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c)(4) by a preponderance of the evidence.

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed in part, vacated in part and this case is remanded to the administrative law judge 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