BRB No. 97-1836 BLA

THOMAS ZDANCEWICZ	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Thomas Zdancewicz, Swoyerville, Pennsylvania, *pro se*.

Barry H. Joyner (Marvin Krislov, Deputy Solicitor for National Operations; 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 BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant, without legal representation, appeals the Decision and Order Denying Benefits (97-BLA-0785) of Administrative Law Judge Robert D. Kaplan on a duplicate 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.* Claimant filed

this duplicate claim on June 14, 1996.[1] The administrative law judge initially found that claimant established five years and three months of coal mine employment. Inasmuch as the administrative law judge found the newly submitted evidence insufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c), the administrative law judge found that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied. Claimant appeals, without the assistance of counsel, contesting the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the denial of benefits.

[1] Claimant filed an initial claim for benefits on November 15, 1982. The case was assigned to Administrative Law Judge Thomas M. Murrett, who issued a Decision and Order denying benefits on December 3, 1986. Judge Murrett found that claimant established the existence of pneumoconiosis arising out of coal mine employment, but that claimant was not totally disabled pursuant to 20 C.F.R. §718.204(c). On appeal, the Board affirmed the denial of benefits. *Zdancewicz v. Director, OWCP*, BRB No. 86-3104 BLA (Aug. 24, 1988) (unpublished). Claimant filed a second claim on February 7, 1991. A Decision and Order denying benefits was issued by Administrative Law Judge Ainsworth H. Brown on November 23, 1992. Judge Brown incorporated Judge Murrett's findings that claimant established five years of coal mine employment, and that claimant established the existence of pneumoconiosis arising out of coal mine employment. Judge Brown, however, also determined that claimant was not totally disabled pursuant to 20 C.F.R. §718.204(c). The denial of benefits was affirmed by the Board. *Zdancewicz v. Director, OWCP*, BRB No. 93-0992 BLA (June 29, 1994) (unpublished).

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. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and consistent 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).

Because this case involves a duplicate claim under 20 C.F.R. §725.309(d), claimant must establish a material change in conditions since the denial of his last claim. The United States Court of Appeals for the Third Circuit, within whose jurisdiction this claim arises, has held that an administrative law judge must consider all of the newly submitted evidence, favorable and unfavorable, to determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *See Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). If the miner establishes the existence of that element, he has demonstrated a material change in conditions. *Id*. The administrative law judge must then consider whether all of the record evidence, including that submitted with the previous claim, supports an award of benefits. *Id*.

In the instant case, the administrative law judge properly noted that claimant's previous claims have been denied because the evidence did not establish that claimant is totally disabled. Decision and Order (D&O) at 4. Thus, the administrative law judge correctly stated that in order to establish a material change in conditions, claimant must establish total disability. *Id*. Under 20 C.F.R. §718.204(c)(1), the administrative law judge erroneously found that the February 15, 1995 pulmonary function test is qualifying for total disability. D&O at 6; Director's Exhibit (DX) 8. The error is harmless, however, as the administrative law judge discredited the February 15, 1995 study because it was invalidated by Dr. Spagnolo.[2] D&O at 6; DX 34. With regard to the pulmonary function tests dated December 6, 1994, May 31, 1995, September 12, 1996, and April 23, 1997, the administrative law judge properly found that the studies are non-qualifying for total disability. D&O at 6; DX 6, 7, 9; Claimant's Exhibit (CX) 4. Thus, we affirm the administrative law judge's finding that claimant failed to establish total disability based on the newly submitted evidence under 20 C.F.R. §718.204(c)(1).

The administrative law judge properly found that none of the arterial blood gas study

[2] The administrative law judge stated that "because of Dr. Spagnolo's outstanding qualifications, and because of his uncontested invalidation of this test, I find that the February 15, 1995 pulmonary function test is invalid." Decision and Order (D&O) at 6.

evidence is qualifying for total disability pursuant to 20 C.F.R. §718.204(c)(2). D&O at 6; DX 12, 13, 14. Additionally, the administrative law judge properly noted that, since there is no evidence of record of cor pulmonale with right sided congestive heart failure, claimant is unable to establish total disability pursuant to 20 C.F.R. §718.204(c)(3).

With regard to whether claimant established total disability under 20 C.F.R. §718.204(c)(4), the administrative law judge noted that there are seven newly submitted medical opinions by Drs. Aquilina, Fasciana, Weiss, Talati, Spagnolo, Cohen, and Cali. In weighing the conflicting medical opinion evidence, the administrative law judge permissibly rejected Dr. Fasciana's August 7, 1995 report as being undocumented, noting that the doctor cites no specific laboratory data or clinical findings to support his opinion that claimant is totally disabled. D&O at 7-8; DX 19; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The administrative law judge also properly found Dr. Cali's opinion, that claimant should have no further coal dust exposure, to be insufficient to establish total disability under Section 718.204(c)(4). *See* D&O at 10-11; CX 1, 3; *Taylor v. Evans and Gambrel Co., Inc.*, 12 BLR 1-183 (1988).

Additionally, we affirm the administrative law judge's treatment of Dr. Weiss's opinion. As noted by the administrative law judge, Dr. Weiss opined that claimant was totally disabled based on the results of a cardiopulmonary stress test, which the doctor interpreted as demonstrating a significant limitation in exercise capability. Dr. Weiss, however, specifically stated that claimant has no pulmonary impairment, and that the exact etiology of the exercise intolerance cannot be identified. Because Dr. Weiss failed to diagnose a respiratory or pulmonary impairment, the administrative law judge properly found Dr. Weiss's opinion insufficient to carry claimant's burden of proof at Section 718.204(c). *See* D&O at 8; DX 20; *Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995).

Notwithstanding, we hold that the administrative law judge erred by discrediting Dr. Aquilina's opinion, DX 17, that claimant is totally disabled, as being not well-reasoned. In addressing Dr. Aquilina's opinion, the administrative law judge stated "Dr. Aquilina's opinion is flawed in that he considered the pulmonary function tests to be abnormal. This contradicts not only Dr. Weiss's evaluation of the December 6, 1994 test but Dr. Aquilina's own statement regarding Claimant's May 31, 1995 pulmonary function test." D&O at 7. Contrary to the administrative law judge's finding, however, Dr. Aquilina's opinion is not contradictory. We note that Dr. Aquilina never described claimant's May 31, 1995 pulmonary function test as normal. Rather, the technician administering the test stated that the test was within normal limits subject to the physician's review. DX 7. Based on Dr. Aquilina's review of the May 31, 1995 study, the doctor opined that claimant is totally disabled. Because Dr. Aquilina's opinion is not internally inconsistent as alleged by the administrative law judge, we vacate the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c)(4). On remand, the

administrative law judge must reconsider whether Dr. Aquilina's opinion is well-reasoned, *Fields, supra*, and whether it is sufficient to carry claimant's burden of proving total disability.

Additionally, as noted by the Director, the administrative law judge erred in rejecting Dr. Cohen's opinion that claimant is totally disabled simply because Dr. Cohen is a reviewing physician.[3] *See Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 9 BLR 2-10 (3rd Cir. 1986); D&O at 9; CX 2. Although the Director argues that Dr. Cohen's opinion is neither documented nor reasoned, that determination resides with the administrative law judge on remand.

If, on remand, the administrative law judge finds that the newly submitted evidence establishes a totally disabling respiratory impairment at 20 C.F.R. §718.204(c), and therefore establishes a material change in conditions, he must then consider all of the evidence of record to determine whether it establishes entitlement to benefits. *See Swarrow, supra.*

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.

BETTY JEAN HALL, Chief

[3] The Director, Office of Worker's Compensation Programs, correctly points out that the administrative law judge's rationale for rejecting Dr. Cohen's opinion is inconsistent with his weighing of Dr. Spagnolo's opinion. The administrative law judge stated that he was assigning Dr. Cohen's report little probative weight "because Dr. Cohen relied wholly on the opinions of other physicians." D&O at 9. Dr. Spagnolo is also a reviewing physician, but the administrative law judge credited Dr. Spagnolo's opinion, that claimant is not totally disabled, because it was based on "a thorough review of claimant's medical records." *Id*.

Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge