BRB No. 00-0846 BLA

HAROLD THOMPSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DAN DAMRON TRUCKING COMPANY	)	
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS	)	DATE ISSUED:
SELF-INSURANCE FUND	)	
	)	
Employer/Carrier-Respondents	)	
	)	
SHELBY FUELS CORPORATION	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 - Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Harold Thompson, Virgie, Kentucky, *pro se*.

David H. Neeley (Neeley & Reynolds, PSC), Prestonsburg, Kentucky, for Dan Damron Trucking Company and Kentucky Coal Producers Self-Insurance Fund, employer-carrier.

Laura Metcoff Klaus and W. William Prochot (Greenberg Traurig LLP), Washington D.C., for Shelby Fuels Corporation and Old Republic Insurance Company, employer-carrier.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (99-BLA-579) of Administrative Law Judge Daniel J. Roketenetz 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).[1] In this duplicate claim, the administrative law judge noted that claimant's prior claim had been denied because he failed to establish the existence of pneumoconiosis or a totally disabling respiratory impairment.[2] The administrative law judge credited claimant with 13.65 years of coal mine employment, and found the newly submitted evidence insufficient to establish the existence of pneumoconiosis. Further, the administrative law judge found that, even assuming that claimant had established the existence of pneumoconiosis, the newly submitted evidence was also insufficient to demonstrate the presence of a totally disabling respiratory impairment due to pneumoconiosis and that claimant had not, therefore, established a material change in conditions. Accordingly, benefits were denied.

On appeal, claimant generally challenges the denial of benefits. Dan Damron Trucking Company (Damron) and its insurer, Kentucky Coal Producers Self-Insurance Fund,

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[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, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant filed his initial claim on November 23, 1987, which the district director denied on May 10, 1988. Director's Exhibit 43. Claimant took no further action until he filed the present claim on January 7, 1997. Director's Exhibit 1. The district direct denied the present claim on May 5, 1997 on the grounds that the evidence of record did not establish the existence of pneumoconiosis arising out of coal mine employment or a totally disabling respiratory impairment, and thus, was insufficient to demonstrate a material change in conditions. Director's Exhibit 20. The district director also denied this claim for the same reasons after a conference on November 26, 1997. Director's Exhibit 42.

respond, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. Shelby Fuels Corporation (Shelby) and its insurer, Old Republic Insurance Company, also respond, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not respond to this appeal.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United 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 claims, 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 March 9, 2001, to which the employer and the Director have responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Claimant, who is proceeding without the assistance of counsel, also responded, arguing generally that he is entitled to benefits. After consideration of these briefs and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, we will proceed to adjudicate the merits of 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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *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 in accordance with 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove 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. Failure to establish any one of these elements precludes entitlement.[3] *Trent v. Director, OWCP*, 11 BLR 1-26 (1987);

[3] Since the miner's last coal mine employment took place in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v.*

Perry v. Director, OWCP, 9 BLR 1-1 (1986)(*en banc*).

Because this case involves a duplicate claim, claimant bears the burden of demonstrating a material change in conditions based on the newly submitted evidence. As this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, the administrative law judge properly applied the standard enunciated in *Sharondale Corp. v. Ross*, 43 F.3d 993, 19 BLR 2-10 (6th Cir. 1994) for determining whether claimant established a material change in conditions. In *Ross*, the court held that in ascertaining whether a claimant established a material change in conditions, the administrative law judge must consider and weigh all the newly submitted evidence to determine if claimant has established at least one of the elements of entitlement previously decided against him. In the instant case, the administrative law judge correctly concluded that the prior claim was denied because claimant had not established either the existence of pneumoconiosis or a totally disabling respiratory impairment due to pneumoconiosis. Decision and Order at 8.

In reviewing the newly submitted evidence regarding the existence of pneumoconiosis, the administrative law judge properly found that none of the x-ray interpretations generated since the denial of claimant's prior claim indicates the presence of pneumoconiosis since all the x-ray interpretations were negative for the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(1); Director's Exhibits 18, 19, 38-41, 45. Likewise, the administrative law judge also correctly determined that since the record contained no biopsy evidence, claimant did not establish the existence of pneumoconiosis at Section 718.202(a)(2)(2000), and that claimant, a living miner, was not entitled to the presumptions at Section 718.202 (a)(3)(2000), as this claim was filed after January 1, 1982 and the record does not contain any evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(3), 718.304, 718.305(e), 718.306 (2000). We, therefore, affirm the findings of the administrative law judge that the newly submitted evidence was insufficient to demonstrate a material change in conditions at Section 718.202(a)(1)-(3) as it is supported by substantial evidence. *Id*.

Director, OWCP, 12 BLR 1-200 (1989)(*en banc*).

We must, however, vacate the administrative law judge's finding that the newly submitted medical opinion evidence was insufficient to establish the existence of pneumoconiosis. Subsequent to the issuance of the administrative law judge's Decision and Order in this case, the court, in *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, BLR 2- (6th Cir. 2000), provided additional direction for determining whether a medical opinion is sufficient to meet claimant's burden of proving the existence of pneumoconiosis. The court held that when determining the credibility of medical opinions regarding the presence or absence of pneumoconiosis, the administrative law judge must consider not only whether the opinions address the medical definition of pneumoconiosis but also the broader statutory definition of pneumoconiosis provided by the Act. 20 C.F.R. §718.201; *Cornett*, 227 F.3d at 576-577. When making findings on the existence of pneumoconiosis, the court advised that the administrative law judge must determine if a physician has provided an explanation for excluding coal dust as an aggravating factor in a claimant's respiratory problems.[4] *Id*. The court further instructed that it would be improper for the administrative law judge to discount a medical opinion which finds coal dust exposure an aggravating factor in a claimant's pulmonary problem, as such a diagnosis by a physician meets the legal definition of pneumoconiosis. *Id*. Likewise, the court indicated that the administrative law judge cannot credit a medical opinion which uses a medical definition of pneumoconiosis, as opposed to a definition of "legal" pneumoconiosis, to explain why pulmonary problems are not due to coal dust exposure.[5] *Id*. Thus, on remand, the administrative law judge must not only

[4] In his medical report, Dr. Westerfield noted a history of coal dust exposure, respiratory symptoms, and some abnormalities on physical examination. Director's Exhibit 45. Dr. Westerfield diagnosed COPD caused by smoking, no coal workers' pneumoconiosis, and assessed an AMA class III respiratory impairment from COPD. *Id*.

Dr. Broudy examined claimant in 1988 and in 1997, Director's Exhibits 40, 41, Dr. Broudy diagnosed moderately severe COPD related to smoking in 1997 and chronic bronchitis with mild chronic airways obstruction due to smoking in 1988. *Id*. Dr. Broudy stated that claimant did not suffer from coal workers' pneumoconiosis or a significant pulmonary disease/ respiratory impairment from coal mine employment. *Id*. In reaching these conclusions, Dr. Broudy testified on deposition that because coal workers' pneumoconiosis causes a restrictive impairment and claimant had an obstructive impairment, he could medically distinguish between pulmonary disability caused by smoking and coal dust. Director's Exhibit 41 at p. 19-20.

[5] Dr. Fino concluded that claimant's medical records did not have sufficient objective evidence to diagnose simple coal workers' pneumoconiosis or an occupationally acquired pulmonary condition because the x-rays were negative and pulmonary function studies showed an obstructive impairment. Director's Exhibit 45. Dr. Fino explained that obstructive lung disease arises from coal workers' pneumoconiosis when significant

determine if the medical opinions of Drs. Fritzhand, Broudy, Westerfield, and Fino are reasoned and documented, he must also review these physicians' opinions under the guidelines outlined by the court in *Cornett*[6] and decide if the newly submitted evidence is sufficient to establish the existence of pneumoconiosis as defined in the Act, and thus, a material change in conditions. *See* 20 C.F.R. §§718.202(a)(4), 718.201, 725.309 (1999); *Cornett, supra*; *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994).

"fibrosis" is present. *Id*.

[6] Dr. Fritzhand diagnosed pneumoconiosis based on a long exposure to coal dust particles and COPD due to exposure to coal dust particles, Director's Exhibit 16. Dr. Fritzhand thus concluded that claimant had an occupational lung disease due to a long history of exposure to coal dust and that claimant did not have the respiratory capacity for coal mine employment or comparable and gainful work based on his pulmonary function studies.

Next, the administrative law judge reviewed only the newly submitted evidence regarding the presence of a totally disabling respiratory impairment.[7] *See* Decision and Order at 12-14. At Section 718.204(c)(1), the administrative law judge determined that the record contained seven newly submitted pulmonary function studies, of which four contained qualifying values under the regulatory criteria for disability and three contained nonqualifying values under the regulatory criteria for disability.[8] *See* 20 C.F.R.

[7] After concluding that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis and a material change in conditions, the administrative law judge said, in his Decision and Order at page 12: "Assuming, *arguendo*, that the Claimant had [sic] now established the existence of pneumoconiosis, he nonetheless could not establish that he is now totally disabled due to pneumoconiosis. 20 C.F.R. §718.204(b)..." This statement appears to indicate that the administrative law judge considered the issue of total disability on the merits without first deciding if claimant established a material change in conditions based on the presence of a totally disabling respiratory impairment. *See Sharondale Corp. v. Ross*, 43 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

[8] The record contains seven new pulmonary function studies. *See* Director's Exhibits 14, 15, 40, 41, 43-15, 45. The studies dated July 5, 1988 and January 31, 1997, along with the post-bronchodilator study of April 21, 1997, produced values which are above the regulatory criteria for disability. *See* 20 C.F.R. §718.204(c)(1), Appendix B. The studies performed on March 26, 1997 and November 19, 1998, as well as the pre-bronchodilator study performed on April 21, 1997 produced values which meet the regulatory criteria for disability. *Id*.

§718.204(c)(1), Appendix B (2000). In weighing this evidence, the administrative law judge properly concluded that the January 31, 1997 and March 26, 1997 qualifying studies were invalid based on the reports of reviewing physicians. *See* Director's Exhibits 14, 15, 45. The administrative law judge also correctly concluded that the remaining studies were valid, and therefore credible. *See* 20 C.F.R. §718.204(c)(1). In finding the weight of the newly submitted pulmonary function study evidence sufficient to demonstrate the presence of a totally disabling respiratory impairment at Section 718.204(c)(1), the administrative law judge permissibly noted the progressive nature of pneumoconiosis to find the most recent study the most reliable. *See Crace v. Kentland-Elkhorn Coal Corp.*, 109 F.3d 1163, 21 BLR 2-73 (6th Cir. 1997); *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Trent*, *supra*. We, therefore, affirm the administrative law judge's weighing of the pulmonary function study evidence as it is supported by substantial evidence.

At Section 718.204(c)(2), the administrative law judge properly found the newly submitted blood gas study evidence insufficient to demonstrate the presence of a totally disabling respiratory impairment as none of the studies produced qualifying values under the regulatory criteria for disability.[9] *See* 20 C.F.R. §718.204(c)(2), Appendix C (2000); Director's Exhibits 16, 17, 40, 41, 43-15, 45. In addition, the administratively law judge correctly concluded that the record contained no evidence of cor pulmonale with right sided congestive heart failure, and thus, claimant had not established the presence of a disabling respiratory impairment at section 718.204(c)(3). *See* 20 C.F.R. §718.204(c)(3). We, therefore, affirm the findings of the administrative law judge at Section 718.204(c)(2) and (c)(3) as they are supported by substantial evidence.

[9] The administrative law judge determined that the record contained two new blood gas studies. *See* Decision and Order at 13. The record contains four blood gas studies performed following the denial of claimant's prior claim. *See* Director's Exhibits 16, 17, 40, 41, 43-15, 45. The studies performed on July 5, 1988, January 31, 1997, April 21, 1997 and November 19, 1998 produced values above the regulatory criteria for disability. *See* 20 C.F.R. §718.204(c)(2), Appendix C (2000).

The administrative law judge's findings at Section 718.204(c)(4), however, must be vacated in light of *Cornett*. In finding the medical opinion evidence insufficient to support the presence of a totally disabling respiratory impairment, the administrative law judge improperly found that Dr. Westerfield's opinion was not relevant because the physician provided no opinion on the degree of claimant's impairment. *See* Decision and Order at 13. In his report, however, Dr. Westerfield described the severity of claimant's impairment as "AMA class 3 40%". *See* Director's Exhibit 45. This medical assessment when compared to the exertional requirements of claimant's usual coal mine employment may be found to establish a totally disabling respiratory impairment. *See Cornett*, *supra*. On remand, therefore, the administrative law judge should compare Dr. Westerfield's impairment rating with the exertional requirements of claimant's usual coal mine employment to determine if this report is sufficient to demonstrate the presence of a totally disabling respiratory impairment.[10] *See Cornett*, 227 F.3d at 578. Likewise, the administrative law judge needs to reconsider Dr. Broudy's disability assessment since the court, in *Cornett*, held that a physician's knowledge of the exertional requirements of a claimant's usual coal mine employment is essential in determining the credibility of the physician's disability diagnosis. *Id*. In addition, the administrative law judge must reconsider, in light of all the newly submitted evidence of record regarding pulmonary disability, the documentation reviewed by Dr. Fino when making his disability diagnosis to determine if his opinion was reasoned. *See Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Next, in deciding whether the newly submitted evidence is sufficient to demonstrate the presence of a totally disabling respiratory impairment, the administrative law judge must weigh all the evidence supportive of claimant's burden of proof as well as the contrary evidence. 20 C.F.R. §718.204(b)(i)-(iv); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987)(*en banc*).

Lastly, the administrative law judge credited claimant with 13.65 years of coal mine employment based on the Director's calculations. *See* Decision and Order at 5. The record contains two earnings statements from the Social Security Administration, affidavits, and testimony regarding claimant's coal mine employment. *See* Director's Exhibits 3-5, 7-11, 38, 43-104 to 43-113; Hearing transcript at 15-23, 28-44. As the administrative law judge has not provided an explanation for his reliance on the calculations of the district director, particularly in light of the other evidence in the record, we vacate the findings of the administrative law judge on the length of coal mine employment and remand this case for further findings on the length of claimant's coal mine employment. *See* 20 C.F.R.

[10] As the administrative law judge did not determine the nature of claimant's usual coal mine employment, he must make findings regarding claimant's usual coal mine employment and the exertional requirements of this employment on remand. In the instant case, the administrative law judge considered only claimant's duties in his last month of employment. *See* Decision and Order at 13.

§§725.102(a)(26), 725.202(a), 718.203(b). *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988); *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58, n.1 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985).

Accordingly, the Decision and Order of the administrative law judge denying 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

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge