BRB No. 00-0995 BLA

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| HUBERT ASBURY | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| U.S. STEEL MINING COMPANY, INCORPORATED | ) | DATE ISSUED:_____ |
| | ) | |
| 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 - Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Hubert Asbury, Bluefield, Virginia, *pro se*.[1]

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

Mary Forrest-Doyle (Judith E. Kramer, 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

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

Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH and DOLDER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand - Denying Benefits (99-BLA-1156) of Administrative Law Judge Rudolf L. Jansen 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).[2] This case involves a request for modification on a duplicate claim.[3] Adjudicating the miner's duplicate claim

[2]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.

[3]Claimant filed his first application for benefits on July 30, 1990, which was denied by the district director on November 23, 1990 for failure to establish total disability due to pneumoconiosis. Director's Exhibit 33. Claimant did not appeal this decision, which was then finally denied and administratively closed. Director's Exhibit 34. On February 8, 1995, claimant filed his second application for benefits. Director's Exhibit 1. The claim was denied by Administrative Law Judge Robert G. Mahony on February 13, 1997, based upon a finding that claimant's newly submitted evidence failed to establish total disability, and thus, a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Director's Exhibit 46. Claimant appealed to the Board, which vacated the administrative law judge's Decision and Order, and remanded the case to the administrative law judge to determine whether claimant waived his right to representation at no cost to him pursuant to *Shappell v. Director, OWCP*, 7 BLR 1-304 (1984). *See Asbury v. U.S. Steel Mining Co.*, BRB No. 97-0779 BLA (Feb. 25, 1998)(unpub.). The case was reassigned to Administrative Law Judge Clement J. Kichuk, who issued an order on August 6, 1998, requiring claimant to inform the Court in writing whether he understood that he has a right to be represented at no cost to him. Director's Exhibit 57. Furthermore, the administrative law judge noted that claimant submitted additional evidence on June 28, 1998, which constitutes a request for modification. *Id*. On August 31, 1998, claimant responded in writing, indicating that he could not find an attorney in his area, but wished to proceed nevertheless. Director's Exhibit 58. On September 11, 1998, the case was remanded to the district director who denied the claim on April 21,

pursuant to 20 C.F.R. Part 718 (2000), the administrative law judge accepted the parties' stipulation that claimant worked for twenty-five years in underground coal mine employment. The administrative law judge then found that claimant's prior claim was denied for failure to establish total disability. Considering the newly submitted evidence in conjunction with the previously submitted evidence, the administrative law judge determined that no mistake in fact exists pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge further found that the newly submitted evidence failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in his weighing of the medical evidence. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has indicated that he will not participate in this appeal.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all Black Lung claims pending on appeal before the Board, except for those cases where the Board determines after briefing by the parties, 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 employer and the Director have responded.[4]

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1999. Director's Exhibit 60, 71. Claimant requested a formal hearing, and the case was transferred to the Office of Administrative Law Judges. Director's Exhibit 73.

[4]Employer's brief, dated April 27, 2001, and the Director's brief, dated May 8, 2001, both assert that the application of the revised regulations to this claim will not alter its outcome. Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order, would be construed as a position that the challenged regulations will not affect the outcome of this case.

Based on the briefs submitted by the parties, 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.

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. *See Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We 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); *See O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits 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. 20 C.F.R.§§718.3, 718.202, 718.203, 718.204 (2000). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

In considering claimant's request for modification of his duplicate claim, the administrative law judge must apply the holding in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1995), *cert. denied*, 519 U.S. 1090 (1997), for establishing entitlement in a duplicate claim pursuant to Section 725.309 (2000), in conjunction with the modification provisions contained at Section 725.310 (2000). Accordingly, the administrative law judge must consider the evidence submitted in support of the request for modification along with the evidence submitted in support of the duplicate claim, to determine whether claimant established a required element of proof which could establish a material change in condition. *See Hess v. Director, OWCP*, 21 BLR 1-142 (1998).

The administrative law judge first found that the only newly submitted pulmonary function study, dated November 3, 1999, failed to produce qualifying values.[5] Decision

[5]A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed the table values.

and Order at 8; Employer's Exhibit 1. Thus, the administrative law judge properly determined that claimant failed to establish total disability pursuant to Section 718.204(c)(1)(2000).

The administrative law judge next found that two newly submitted arterial blood gas studies, dated March 15 and March 25, 1998 produced qualifying results. Decision and Order at 8; Director's Exhibit 62. However, the administrative law judge found that the record also contained a medical opinion, which stated that the studies are not valid for the purpose of determining total disability as they were conducted when claimant was in acute distress.[6] The administrative law judge acted within his discretion in relying upon the medical opinion which better addressed claimant's condition at the time of the testing to determine that the March 1998 blood gas studies were not valid. *See generally Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985). The administrative law judge then permissibly relied upon the most recent arterial blood gas study in the record, dated November 3, 1999, which yielded non-qualifying values, and concluded that the blood gas study evidence of record did not support finding that claimant was totally disabled. Employer's Exhibit 1; *Sexton v. Southern Ohio Coal Co.*, 7 BLR 1-411 (1984). We therefore affirm the administrative law judge's conclusion that the newly submitted pulmonary function study and blood gas study evidence fails to establish total disability pursuant to Section 718.204(c)(1)-(2)(2000), as supported by substantial evidence.

Because the administrative law judge properly found that the evidentiary record does not contain evidence of cor pulmonale with right-sided congestive heart failure, we affirm his determination that total disability cannot be demonstrated under Section 718.204(c)(3)(2000). *See* 20 C.F.R. 718.204(c)(3)(2000); *Newell v. Freeman United Mining Co.*, 13 BLR 1-37, 1-39 (1989); Decision and Order at 9.

[6]The administrative law judge found that a physician "with an illegible signature" found that both studies were technically acceptable on October 19, 1998. Decision and Order at 6; Director's Exhibit 63. Subsequent to a query by the district director regarding the validity of the tests due to the miner's acute condition at the time of the testing, the same physician responded that the tests are valid, but that their use in determining permanent disability "is not a valid concept." Director's Exhibit 70.

Pursuant to Section 718.204(c)(4)(2000), the administrative law judge permissibly accorded less weight to the opinion of Dr. Qazi, that claimant has a history of significant chronic obstructive pulmonary disease with interstitial pneumoconiosis and is completely disabled from gainful employment, due to the physician's lack of credentials in pulmonary medicine. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Director's Exhibit 55; Decision and Order at 9. Turning to the conflicting opinions of board-certified pulmonologists Drs. Krishnan and Hippensteel, the administrative law judge found that Dr. Krishnan's opinion, that claimant is totally disabled due to pneumoconiosis, was entitled to less weight because the physician's opinion was based on claimant's exposure of thirty to thirty-three years of coal mining employment. Decision and Order at 9; Director's Exhibit 55. The administrative law judge found that Dr. Hippensteel also relied on a history of thirty years of coal mine employment, but found that this error actually bolsters the physician's opinion since he found claimant was not totally disabled despite overestimating his coal dust exposure. Decision and Order at 9; Employer's Exhibit 1. Thus, despite their status as treating physicians, the administrative law judge found that the opinions by Drs. Krishnan and Qazi were not entitled to greater weight than Dr. Hippensteel, and concluded that the newly submitted evidence did not support a finding that claimant was totally disabled. The administrative law judge further found that the previously submitted medical opinions did not support a finding of total disability inasmuch as Dr. Vasudevan's opinion that claimant was not totally disabled was entitled to more weight due to his qualifications as a Board-certified physician in Internal Medicine and Pulmonary Disease.[7] The administrative law judge thus concluded that claimant had not established a material change in conditions or a mistake in a determination of fact. Decision and Order at 9; Employer's Exhibit 1.

[7]The administrative law judge also noted that the record contains a letter by Dr. Javed, dated January 21, 1999, stating that claimant is under his care, recently underwent surgery for three vessel coronary artery disease, and is not currently able to undergo a ventilatory study or arterial blood gas study. Director's Exhibit 69. On December 7, 1999, Dr. Javed issued a second letter, in which he outlined his care of claimant, and opined that claimant's functional capacity is moderate. Dr. Javed further stated that claimant has rhonchi and rales from time to time and is very sensitive to smoke and dust and develops more bronchospasms and shortness of breath. On this basis, Dr. Javed opined that claimant qualifies for black lung disability benefits as claimant cannot do moderate to severe activities. Claimant's Exhibit 1. The administrative law judge found that the Dr. Javed's opinion is not probative as he is unclear regarding the cause of claimant's impairment.

Initially, we hold that the administrative law judge permissibly accorded less weight to the opinion of Dr. Qazi, that claimant is completely disabled from gainful employment, from a respiratory standpoint due to his lack of credentials in pulmonary medicine. *See Dillon, supra.* In weighing the opinions of Drs. Hippensteel and Krishman, however, the administrative law judge failed to explain how the physicians' reliance on claimant's history of coal mine employment supports their conclusions regarding total disability, and more specifically, how the additional five years of coal mine employment noted by Dr. Hippensteel "bolstered" the physician's opinion. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

In *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997), the Fourth Circuit indicated that in assessing the relative probative weight of the medical opinions of record, an administrative law judge must address the qualifications of the respective physicians, the explanation of their conclusions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses.[8] *See Akers*, *supra*; *see also U.S. Steel Mining Co., Inc. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). In light of the administrative law judge's failure to articulate valid reasons for crediting Dr. Hippensteel's opinion over Dr. Krishnan's, we vacate the administrative law judge's findings pursuant to Section 718.204(c)(4) and remand the case for further consideration of the evidence. On remand, the administrative law judge is required to first determine whether a totally disabling respiratory impairment is established pursuant to Section 718.204(c)(4).

Further, if the administrative law judge determines that the medical opinion evidence establishes a totally disabling respiratory impairment then the administrative law judge must then consider all like and unlike evidence together to determine whether total disability is established by a preponderance of the evidence pursuant to Section 718.204(c)(2000). *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); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986); *Gee*

[8]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's last full year of coal mine employment occurred in West Virginia. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

*v. W.G. Moore & Sons*, 9 BLR 1-4 (1986). Finally, if the administrative law judge finds total disability established, he must then consider whether claimant's total disability is due to pneumoconiosis pursuant to Section 718.204(b). *See Tucker v. Director, OWCP*, 10 BLR 1-35 (1987).

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed in part, vacated in part, and the case is remanded for further consideration of the evidence consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge