BRB No. 03-0567 BLA

PAUL D. OWENS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	
	)	DATE ISSUED: 06/02/2004
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 Modification of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Paul D. Owens, Haysi, Virginia, *pro* se.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order Denying Modification (02-BLA-0450) of Administrative Law Judge Daniel F. Solomon

[1]Claimant is Paul D. Owens, the miner, whose first claim for benefits, filed on September 16, 1994, was finally denied on November 16, 1994. Director's Exhibits 35-1, 35-13. Claimant's second claim for benefits, the present claim, was filed on October 30, 1998. Director's Exhibit 1. A decision was rendered on the record in this case pursuant to claimant's request.

(the administrative law judge) in a miner's 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*. (the Act).[2] Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order at 6-9. The administrative law judge found that claimant failed to establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).[3] *Id.* Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). 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 the Act, 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case involves a request for modification of the denial of a duplicate claim. Citing *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), Administrative Law Judge John C. Holmes denied claimant's second claim for benefits on March 22, 2000, because claimant failed to establish any one of the three elements of entitlement, all of

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[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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3]Although the Department of Labor has made substantive revisions to 20 C.F.R. §§725.309 and 725.310 in the new regulations, these revisions only apply to claims filed after January 19, 2001.

which had been the basis of his prior denial by the district director.[4] *See* Director's Exhibit 35-13. Judge Holmes found, however, that the evidence showed claimant was totally disabled due to a cardiac condition, unrelated to coal mine employment. Claimant appealed, and on June 26, 2001, the Board affirmed Judge Holmes's decision denying benefits, holding that Judge Holmes properly concluded that claimant had not established the existence of pneumoconiosis based on the evidence of record, hence, he could not establish entitlement to benefits. Director's Exhibits 60, 75. In light of its affirmance of Judge Holmes's determination that claimant failed to establish the existence of pneumoconiosis, the Board deemed harmless any error Judge Holmes may have made in finding that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Director's Exhibit 75. Claimant filed a motion for reconsideration that the Board summarily denied on January 23, 2002. Director's Exhibit 78. Thereafter, claimant timely requested modification of Judge Holmes's decision and submitted new evidence. Director's Exhibit 79. The district director denied claimant's request for modification, and claimant requested a hearing before the Office of Administrative Law Judges. Director's Exhibits 87, 90. The case was assigned to Judge Solomon, who, with the agreement of the parties, decided the case on the record. On April 29, 2003, he issued his Decision and Order Denying Modification.

Because the instant claim is a duplicate claim it "shall…be denied on the grounds of the prior denial, unless the deputy commissioner determines that there has been a material change in conditions…" 20 C.F.R. §725.309(d) (2000). The United States Court of Appeals for the Fourth Circuit has construed this regulation: "The duplicate claims regulation, 20 C.F.R. §725.309(d), does not bar new claims, but rather directs that they shall be denied based on the earlier denial absent a threshold showing of a material change in conditions." *Rutter,* 86 F.3d at 1362, 20 BLR at 2-235. Because Judge Holmes found that claimant failed to establish a material change in conditions, claimant still has the burden of showing a material change in conditions before he is entitled to further adjudication. *See Sharondale Corp. v. Ross,* 42 F.3d 993, 996, 19 BLR 2-10, 2-15

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[4] The district director advised claimant that his claim had been denied because his evidence failed to establish the following conditions which are essential to qualification for black lung benefits:

> 1. …that you have pneumoconiosis (black lung disease);
> 2. …that the disease was caused at least in part by coal mine work;
> 3. …that you are totally disabled by the disease. Totally disabled means you are unable to perform the type of work required by your coal mine work because of a breathing impairment caused by pneumoconiosis (black lung disease).

Director's Exhibit 35-13.

(6th Cir. 1994). Since this is a petition for modification of a denial of a duplicate claim, claimant must then show that Judge Holmes made a mistake in a determination of fact when he found that claimant failed to establish a material change in conditions. *See Bartley v. Director, OWCP*, 11 Fed.Appx. 564 (6th Cir. June 7, 2001)(unpublished)(in which the court set forth this procedural analysis).

The administrative law judge in the instant case failed to recognize that this was a duplicate claim and that claimant was obliged to establish a material change in conditions before he is entitled to further adjudication. In treating this case as simply a petition for modification the administrative law judge ignored the applicable law. *See* 20 C.F.R. §725.309(d) (2000); *Rutter*, 86 F.3d 1358, 20 BLR 2-227. Although the administrative law judge did not make a separate and distinct finding under 20 C.F.R. §725.309(d) (2000), he implicitly found that claimant did not demonstrate a material change in conditions when he determined that claimant did not establish the existence of pneumoconiosis. In the case at bar, inability to establish the existence of pneumoconiosis is equivalent to inability to establish a material change in conditions because the three bases of claimant's prior denial require proof of the existence of pneumoconiosis. [5] *See* Director's Exhibit 35-13.

The administrative law judge properly analyzed the evidence regarding the existence of pneumoconiosis pursuant to Section 718.202(a)(1). He found that claimant failed to establish the existence of pneumoconiosis by the newly submitted x-ray evidence, noting "the numerical disparity [between the positive and negative readings] and the fact that the most recent evidence is negative." Decision and Order at 7. Because the newly submitted x-ray evidence consists of fourteen interpretations of ten x-rays, with only one of these interpretations being positive for pneumoconiosis,[6] substantial evidence

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[5] Because the third basis for the denial stated by the district director is that claimant failed to show that he was totally disabled due to pneumoconiosis, claimant cannot establish a material change in conditions by showing he is now totally disabled without also showing that his disability is due to pneumoconiosis. *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 609 n.7, 22 BLR 2-288, 2-301 n.7 (6th Cir. 2001). In any event, the administrative law judge did not find claimant totally disabled within the meaning of the Black Lung Act because claimant does not have a totally disabling pulmonary or respiratory impairment as required by 20 C.F.R. §718.204(c) (2000); claimant has a disabling heart condition. Decision and Order at 9.

[6]The administrative law judge erroneously stated that there were two positive interpretations of the February 21, 2002 x-ray. Decision and Order at 6. Contrary to the

supports the administrative law judge's finding that the newly submitted x-ray evidence is negative for pneumoconiosis. *See Doss v. Director, OWCP*, 53 F.3d 654, 19 BLR 2-181 (4th Cir. 1995); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *see also Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984). Therefore, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis and a change in conditions based on the newly submitted x-ray evidence.

The administrative law judge permissibly found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) because the record does not contain any biopsy evidence. Decision and Order at 6. Moreover, since there is no new evidence of complicated pneumoconiosis and the instant case involves a living miner's claim filed after January 1, 1982, the administrative law judge correctly determined that claimant is not entitled to any of the presumptions set forth at 20 C.F.R. §718.202(a)(3). *See* 20 C.F.R. §§718.304, 718.305(e), 718.306. Therefore, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis and a change in conditions at Section 718.202(a)(2), (a)(3).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the newly submitted medical opinion evidence: an opinion by Dr. Forehand, the claimant's treating physician, who found occupational lung disease due to coal mine employment, and an opinion by Dr. Hippensteel, who found no evidence of coal workers' pneumoconiosis or of a coal mine dust-related disease of the lungs. Director's Exhibit 79; Claimant's Exhibit 1; Employer's Exhibits 4, 14 at 33. While recognizing that Dr. Forehand is claimant's treating physician, the administrative law judge stated that this physician failed "to note the extent and intensity of the Claimant's valvular heart disease," whereas "Dr. Hippensteel discussed the effect[s] of mitral valve stenosis." Decision and Order at 8. Specifically, Dr. Hippensteel testified that mitral stenosis creates pulmonary symptoms and problems, such as shortness of breath and pulmonary edema, and that claimant's x-ray findings are explained by his mitral valve disease. Employer's Exhibit 14 at 14-16, 21-24. In this regard, the administrative law judge found that "Dr. Hippensteel is correct that Dr. Forehand minimized the effect of the Claimant's mitral valve difficulties"[7] and permissibly found Dr. Hippensteel's opinion to be "more

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administrative law judge's statement, the record does not contain a positive reading of this x-ray rendered by Dr. Forehand.

[7]Dr. Hippensteel testified that Dr. Forehand's statement that valvular heart disease does not cause exercise-induced hypoxemia is "flat-out wrong" and shows Dr. Forehand's lack of expertise in adult, heart-related disease. Employer's Exhibit 14 at 31.

rational and better reasoned than Dr. Forehand's [opinion]."[8] Decision and Order at 9; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

Because an administrative law judge has broad discretion in assessing the evidence of record to determine whether a party has met his burden of proof, *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997), and the Board is neither empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge, *see Markus v. Old Ben Coal Co.*, 712 F.2d 322, 5 BLR 2-130 (7th Cir. 1983)(administrative law judge is not bound to accept opinion or theory of any given medical officer, but weighs evidence and draws his own inferences); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis and a change in conditions based on the new medical opinion evidence.

Additionally, while the administrative law judge cited *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), he did not specifically weigh all of the relevant evidence together to determine whether claimant established the existence of pneumoconiosis pursuant to Section 718.202(a). However, because the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis pursuant to each of the subsections found at Section 718.202(a)(1)-(a)(4), *see* discussion, *supra*, it was unnecessary for the administrative law judge to undertake a *Compton* weighing. Therefore, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis based on the newly submitted evidence. *See* 20 C.F.R. §718.202(a).

Moreover, as we discussed *supra*, because claimant failed to establish the existence of pneumoconiosis, he also failed to establish a material change in conditions.

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[8]The administrative law judge erred in holding that Drs. Forehand and Hippensteel are "equally qualified." Decision and Order at 8. Dr. Forehand is a B reader and is Board-certified in pediatrics, allergies, and immunology whereas Dr. Hippensteel is a B reader and is Board-certified in internal medicine, pulmonary disease, and critical care medicine. Decision and Order at 8; Director's Exhibit 13; Employer's Exhibit 4. However, we deem the administrative law judge's error to be harmless, *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), because it did not affect his weighing of the evidence pursuant to 20 C.F.R. §718.202(a)(4). *See* discussion, *supra*.

20 C.F.R. §725.309(d) (2000). As a result, his claim must be denied on the bases of the prior denial. *Id.; Rutter,* 86 F.3d 1358, 20 BLR 2-227.

Accordingly, the administrative law judge's Decision and Order Denying Modification is affirmed.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

I concur.

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BETTY JEAN HALL
Administrative Appeals Judge

I concur in the result only.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge