BRB No. 07-0844 BLA

G.S.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	DATE ISSUED: 06/19/2008
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 on Modification - Rejection of Claim of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

G.S., Richlands, Virginia, *pro se*.

Douglas A. Smoot (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Rita Roppolo (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Modification - Rejection of Claim (04-BLA-0116) of Administrative Law Judge Edward Terhune Miller (the administrative law judge) denying claimant's request for modification of the denial of 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*. (the Act).[1] This case has been before the Board previously.[2] In the most recent appeal, the Board affirmed the administrative law judge's December 10, 2001 decision finding that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000), as the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or total disability pursuant to 20 C.F.R. §718.204(b). The Board, therefore, affirmed the denial of benefits. [*G.S.*] *v. Island Creek Coal Co.*, BRB Nos. 02-0257 BLA and 02-0257 BLA-A (Nov. 26, 2002)(unpub.). The Board's decision was subsequently affirmed by the United States Court of Appeals for the Fourth Circuit.[3] [*G.S.*] *v. Island Creek Coal Co.*, No. 03-1513 (4th Cir. Oct. 22, 2003) (unpub.).

By letter dated January 23, 2004, the district director informed claimant that an overpayment of benefits had occurred because claimant had received interim benefits pursuant to 20 C.F.R. §725.410(c) (1999), but had subsequently been found not to be entitled to benefits. Director's Exhibit 43. Claimant was informed that he was without fault in the creation of the overpayment, and that he could request waiver of recovery of the overpayment on the grounds that recovery of the overpayment would deprive him of income required for ordinary and necessary living expenses, or that he had relinquished a valuable right or changed his position for the worse in reliance upon his receipt of the interim benefits. Director's Exhibit 43. Claimant was informed that if he wished to seek waiver, he should complete and submit an overpayment recovery questionnaire, together with supporting financial documentation. Director's Exhibit 43.

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

[2] The current claim, claimant's third, was filed on April 15, 1999. Director's Exhibit 1. The complete procedural history of this case, set forth in the Board's prior decisions in [*G.S.*] *v. Island Creek Coal Co.*, BRB Nos. 91-1690 BLA and 91-1690 BLA-A (Aug. 13, 1993)(unpub.), [*G.S.*] *v. Island Creek Coal Co.*, BRB No. 94-0800 (Nov. 28, 1994)(unpub.), and [*G.S.*] *v. Island Creek Coal Co.*, BRB Nos. 02-0257 BLA and 02-0257 BLA-A (Nov. 26, 2002)(unpub.), is incorporated herein by reference.

[3] The record indicates that claimant's coal mine employment occurred in Virginia. Director's Exhibit 29. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

On January 30, 2004, claimant requested modification of the prior denial of benefits.[4] The claim was transferred to the Office of Administrative Law Judges, together with a list of contested issues indicating that the Director, Office of Workers' Compensation Programs (the Director), contested both claimant's request for modification and claimant's request for waiver of recovery of the overpayment. Director's Exhibit 48.

In a Decision and Order[5] on Modification dated June 13, 2007, the administrative law judge found that the evidence did not establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Therefore, the administrative law judge found that claimant failed to establish grounds for modification of the prior determination. Accordingly, the administrative law judge denied benefits. Finally, the administrative law judge addressed the issue of waiver of recovery of the overpayment, and found that because claimant had not submitted any evidence to support a determination that repayment would either defeat the purpose of Title IV of the Act or be against equity and good conscience, claimant had not met his burden to establish that a waiver is appropriate in this claim.

On appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the denial of benefits. The Director has filed a limited response urging the Board to vacate the administrative law judge's determination that claimant failed to establish entitlement to a waiver of recovery of the overpayment, and to remand the case to the district director for further development on the issue of waiver. In support of his request, the Director states that the issue of waiver was not yet ripe for consideration by the administrative law judge.

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. *McFall v. Jewell Ridge Coal Corp.*, 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).

[4] Claimant did not submit any additional evidence in support of his modification request. However, employer submitted additional medical evidence in opposition to claimant's request for modification.

[5] The parties waived their rights to an oral hearing.

In this duplicate claim filed on April 15, 1999, which, as noted above, is claimant's third claim, claimant must establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), since the denial of his second claim. In *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), the Fourth Circuit held that in order to establish a material change in conditions, claimant must establish by a preponderance of the evidence developed subsequent to the denial of the prior claim, at least one of the elements of entitlement previously adjudicated against him. Claimant's second claim was denied because he did not establish either the existence of pneumoconiosis or the existence of a totally disabling respiratory impairment. Director's Exhibit 42. Thus, the evidence developed in this claim must establish one of these elements of entitlement for claimant to obtain review of the merits of his claim. In considering a request for modification of the denial of a duplicate claim (which, as here, has been denied based upon a failure to establish a material change in conditions), an administrative law judge must determine whether all of the evidence developed in the duplicate claim, including any new evidence submitted with the request for modification, establishes a material change in conditions. *See* 20 C.F.R. §725.309(d) (2000); *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999); *Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998). If the evidence establishes a material change in conditions, the administrative law judge must then consider the merits of the duplicate claim. *Hess*, 21 BLR at 1-143.

In finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge concluded that there was no mistake in the previous determination that the predominantly negative x-ray evidence failed to establish the existence of pneumoconiosis. The administrative law judge further considered the six newly submitted x-ray interpretations, Employer's Exhibits 1, 2, 7, and properly found that as all of the interpretations were negative for pneumoconiosis, the new x-ray evidence failed to support a finding of the existence of pneumoconiosis. 20 C.F.R. §§718.202(a)(1), 725.103; *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 272-76, 18 BLR 2A-1, 2A-6-9 (1994); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-336 (4th Cir. 1998); Decision and Order at 7. We therefore affirm the administrative law judge's determination that the weight of the x-ray evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

In addition, the administrative law judge properly found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2) and (3) as there was no biopsy evidence of record, this was a living miner's claim filed after January 1, 1982, and there was no evidence of complicated pneumoconiosis in the record. Decision and Order at 7; *see* 20 C.F.R. §§718.202(a)(2), (3), 718.304, 718.305, 718.306.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge rationally found that the medical opinion evidence also failed to support a finding of the existence of pneumoconiosis. The administrative law judge found that there was no mistake in the previous determination that the better reasoned and supported medical opinion evidence failed to support such a finding. Decision and Order at 8. In considering the newly submitted computerized tomography (CT) scan and medical opinion evidence, the administrative law judge properly found that as both of the CT scans were negative for the existence of pneumoconiosis, and as Drs. Hippensteel, McSharry, Morgan, Castle, Fino, and Zaldivar, all opined that claimant did not suffer from pneumoconiosis, Employer's Exhibits 1, 3-6, 8-10, claimant failed to establish the existence of pneumoconiosis by a preponderance of the evidence pursuant to 20 C.F.R. §718.202(a)(4). Accordingly, we affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis by CT scan or medical opinion evidence. 20 C.F.R. §§718.202(a)(4), 725.103; *Ondecko*, 512 U.S. at 272-76, 18 BLR at 2A-6-9; *Compton*, 211 F.3d at 211, 22 BLR at 2-175; *Hicks*, 138 F.3d at 528, 21 BLR at 2-336. Weighing the chest x-rays, CT scans, and medical opinions together, as required in the Fourth Circuit to determine if pneumoconiosis is established, s*ee Compton*, 211 F.3d at 211, 22 BLR at 2-174, the administrative law judge found that the preponderance of the evidence failed to establish the existence of either clinical or legal pneumoconiosis. Decision and Order at 8. Substantial evidence supports this finding. We, therefore, affirm the administrative law judge's finding that the existence of pneumoconiosis was not established at 20 C.F.R. §718.202(a).

The administrative law judge further concluded that claimant was unable to establish the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Initially, the administrative law judge reviewed all of the previously submitted pulmonary function studies, blood gas studies and medical opinions and permissibly concluded that there was no mistake in the prior determination that they did not support a finding of total disability.[6] Decision and Order at 8. Turning to the newly submitted evidence, the administrative law judge properly found that, as all of the pulmonary function and blood gas studies were non-qualifying,[7] claimant failed to

[6] Claimant asserts that, in his December 10, 2001 decision, the administrative law judge erred in evaluating the blood gas studies pursuant to 20 C.F.R. §718.204(b)(2)(ii), and in finding Dr. Forehand's opinion outweighed by the contrary medical opinions pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant's Brief at 1-2. We reject claimant's arguments for the reasons set forth in our prior decision. [2002][*G.S.*], slip op. at 4-6.

[7] A "qualifying" pulmonary function or blood gas study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B, C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii). *See Beatty v. Danri Corp*., 16 BLR 1-11, 1-13-14 (1991); Employer's Exhibit 1; Decision and Order at 3-4, 8. In addition, the record contains no medical evidence that shows that claimant suffers from cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii). Because substantial evidence supports the administrative law judge's findings, we affirm the administrative law judge's finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii).

Finally, considering the newly submitted medical opinions, the administrative law judge properly found that as Drs. Hippensteel, McSharry, Morgan, Castle, Fino, and Zaldivar unanimously opined that claimant retains the respiratory capacity to perform his usual coal mine work or comparable work in a dust free environment, claimant failed to establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv). Based on the foregoing, we affirm the administrative law judge's finding that the preponderance of the newly submitted medical opinion evidence fails to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). *See Ondecko*, 512 U.S. at 272-76, 18 BLR at 2A-6-9; *Compton*, 211 F.3d at 211, 22 BLR at 2-175; *Hicks*, 138 F.3d at 528, 21 BLR at 2-336. We, therefore, affirm the administrative law judge's finding that claimant did not establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b). *See Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11, 1-23 (1999)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986).

Because the administrative law judge properly determined that the evidence developed in the duplicate claim, including the new evidence submitted with the request for modification, failed to establish the existence of pneumoconiosis or a totally disabling respiratory impairment, we affirm his findings that claimant did not establish a basis to modify the prior determination that claimant did not establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000). *See Hess*, 21 BLR at 1-143. We, therefore, affirm the denial of benefits.

We next address the administrative law judge's finding that claimant is not entitled to waiver of recovery of the overpayment of benefits on his claim. The Director concedes that the district director erroneously listed the overpayment issue as ripe for consideration by the administrative law judge, because the Office of Workers' Compensation Programs had not yet completed review of claimant's request for waiver of recovery and had not yet issued a decision on the issue of waiver prior to submission of the case to the administrative law judge. Director's Brief at 2. Therefore, the Director requests that the administrative law judge's determination that claimant failed to establish grounds for waiver of recovery of the overpayment be vacated and the case be remanded to the district director for further consideration of the waiver issue. Director's Brief at 2. Employer does not oppose the Director's request for a remand. Upon review, we

conclude that this case should be remanded to the district director in view of the Director's concession that the issue of waiver was erroneously listed as ripe for adjudication by the administrative law judge. Director's Brief at 2.

Accordingly, the administrative law judge's Decision and Order on Modification - Rejection of Claim is affirmed in part, and vacated in part, and this case is remanded to the district director for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge