BRB No. 98-1584 BLA

GEORGE B. SMITH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STONEY GAP COAL COMPANY	)	
	)	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 of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

George B. Smith, McCarr, Kentucky, *pro se*.

Barry H. Joyner (Henry L. Solano, 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 Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order (98-BLA-0187) of Administrative Law Judge Thomas F. Phalen, Jr. 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). The instant case

involves a duplicate claim filed on October 18, 1996.[1] The district director denied the claim on March 11, 1997. Claimant requested a hearing on June 18, 1997. By letter dated June 20, 1997, the district director informed claimant that his June 18, 1997 correspondence was considered a request for modification. In a Proposed Decision and Order dated July 31, 1997, the district director denied claimant's request for modification. The case was subsequently forwarded to the Office of Administrative Law Judges for a hearing.

The administrative law judge found that the issue before him was whether the evidence was sufficient to establish modification pursuant to 20 C.F.R. §725.310. The administrative law judge noted that claimant had petitioned for modification of the denial of his 1996 claim. The administrative law judge also noted that claimant's 1996 claim was a duplicate claim. "Applying the *Ross* [duplicate claim] standard along with the modification provisions of §725.310," the administrative law judge reviewed the evidence submitted in support of claimant's request for modification in conjunction with the evidence submitted since the denial of claimant's 1986 claim. The administrative law judge noted that if this evidence established one of the

[1]Claimant initially filed a claim for benefits on November 18, 1986. Director's Exhibit 35-420. In a Proposed Decision and Order dated July 10, 1989, the district director denied benefits. Director's Exhibit 35-152. The district director denied benefits again on January 2, 1991. Director's Exhibit 35-50. Although the case was forwarded to the Office of Administrative Law Judges for a formal hearing, claimant failed to appear at the scheduled hearing on June 10, 1992. Director's Exhibit 35-4. In an Order to Show Cause dated June 30, 1992, Administrative Law Judge David DiNardi ordered claimant to show cause why his claim should not be considered abandoned. Director's Exhibit 35-15. Noting that claimant failed to respond to the Order to Show Cause, Judge DiNardi, by Order dated August 3, 1992, dismissed claimant's 1986 claim. Director's Exhibit 35-1.

elements of entitlement that formed the basis for the denial of claimant's 1986 claim, thereby establishing a change in condition or a mistake in a determination of fact, claimant would have established a material change in conditions as a matter of law. The administrative law judge found that the newly submitted evidence was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). The administrative law judge, therefore, found that claimant failed to establish a change in conditions pursuant to 20 C.F.R. §725.310. The administrative law judge also found that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand, arguing that the case must be remanded to the administrative law judge to reconsider whether the newly submitted medical opinion evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and total disability pursuant to 20 C.F.R. §718.204(c)(4). Employer has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue 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 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); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

We initially note that the administrative law judge, in considering the instant claim, should have considered whether the newly submitted evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d), rather than determining whether claimant established a basis for modification of the district director's denial of claimant's 1996 duplicate claim.[2] *See Hess v. Director, OWCP*, 21 BLR 1-141 (1999). This error, however, is harmless in view of the

[2]The Board has held that any party dissatisfied with a district director's determination on a duplicate claim is entitled to have the matter considered by the Office of Administrative Law Judges. *See Rice v. Sahara Coal Co.*, 15 BLR 1-19 (1991) (*en banc*). Moreover, an administrative law judge may properly review, *de novo*, the issue of whether the evidence establishes a material change in conditions. *Id.*

administrative law judge's consideration of whether the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total disability pursuant to 20 C.F.R. §718.204(c). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that in assessing whether a material change in conditions has been established, an administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *Sharondale Corp. v. Ross*, 42 F.3d 993, 996, 19 BLR 2-10, 2-17 (6th Cir. 1994). Claimant's 1986 claim was denied because claimant failed to establish the existence of pneumoconiosis or that he was totally disabled due to pneumoconiosis. Director's Exhibit 35. Consequently, in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309, the newly submitted evidence must support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or a finding of total disability pursuant to 20 C.F.R. §718.204(c).

In determining whether the newly submitted x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge properly accorded greater weight to the interpretations rendered by B readers and/or Board-certified radiologists. See *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 10. All of the newly submitted x-ray interpretations rendered by readers with these qualifications are negative for pneumoconiosis.[3] Director's Exhibits 13, 14, 34; Employer's

[3]Although Dr. Hussain, a physician with no special radiological qualifications, interpreted claimant's October 29, 1996 x-ray as positive for pneumoconiosis, Director's Exhibit 15, Drs. Sargent, Barrett, Wiot and Spitz interpreted this x-ray as negative for pneumoconiosis. Director's Exhibits 13, 14; Employer's Exhibits 3, 5. Drs. Sargent, Barrett, Wiot and Spitz are each dually qualified as B readers and

Exhibits 3, 5-7. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Since the record does not contain any biopsy or autopsy evidence, the administrative law judge properly found that claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 11. Furthermore, claimant is not entitled to any of the statutory presumptions arising under 20 C.F.R. §718.202(a)(3). Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed the instant claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, inasmuch as the instant claim is not a survivor's claim, the Section 718.306 presumption is also inapplicable. *See* 20 C.F.R. §718.306. Consequently, the administrative law judge properly found that claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3). Decision and Order at 11.

After summarizing the newly submitted medical opinion evidence, the administrative law judge found that claimant had not established the existence of pneumoconiosis by a preponderance of the evidence. Decision and Order at 11-12. The Director argues that the administrative law judge offered no explanation for crediting the opinions of Drs. Broudy, Fino and Anderson that claimant did not suffer from pneumoconiosis over Dr. Hussain's contrary opinion. Director's Brief at 4-5; *see* Director's Exhibits 11, 34, 35; Employer's Exhibits 4, 6, 8. We agree. In the instant case, the administrative law judge failed to adequately explain why he credited certain evidence and discredited other evidence. Consequently, the administrative law judge's analysis does not comply with the Administrative

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Board-certified radiologists. *Id.* Dr. Fino, a B reader, also interpreted claimant's October 29, 1996 x-ray as negative for pneumoconiosis. Employer's Exhibit 6. The only other newly submitted x-ray, a film taken on August 12, 1997, was uniformly interpreted as negative for pneumoconiosis. Director's Exhibit 34; Employer's Exhibit 7.

Procedure Act, specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Consequently, we vacate the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and remand the case for further consideration.

We now turn to the administrative law judge's consideration of whether the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). In his consideration of whether the newly submitted pulmonary function study evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1), the administrative law judge noted that the record contains three newly submitted pulmonary function studies conducted on October 29, 1996, January 31, 1997[4] and August 12, 1997. Decision and Order at 13. The administrative law judge noted that claimant's October 29, 1996 and January 31, 1997 pulmonary function studies were invalidated by reviewing physicians.[5] Decision and Order at 13. After noting that only the post-bronchodilator portion of claimant's October 29, 1996 pulmonary function study and the pre-bronchodilator portion of claimant's August 12, 1997 pulmonary function study produced qualifying values, the administrative law judge found that the "weight of the pulmonary function test results does not show a change in condition." Decision and Order at 13.

The administrative law judge erred to the extent that he found that claimant's October 29, 1996 and January 31, 1997 pulmonary function studies are invalid. In his consideration of the October 29, 1996 and January 31, 1997 pulmonary function studies, the administrative law judge erred in not providing a basis for crediting the invalidations of the reviewing physicians over the opinions of the administering physicians. *See Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984). The administrative law judge also failed to explain his basis for finding that the newly

[4]The administrative law judge mistakenly referred to claimant's January 31, 1997 pulmonary function study as a study conducted on January 3, 1997. *See* Decision and Order at 6, 13.

[5]The administrative law judge noted that Drs. Burki and Fino invalidated claimant's October 29, 1996 pulmonary function study while Drs. Broudy and Fino invalidated claimant's January 31, 1997 pulmonary function study. Decision and Order at 6 n.10, 11.

submitted qualifying pulmonary function studies of record were insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1). *See Wojtowicz*, *supra*. In light of the these errors, we vacate the administrative law judge's finding that the newly submitted pulmonary function study evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1).

In his consideration of the newly submitted arterial blood gas study evidence, the administrative law judge properly determined that both of the newly submitted studies are non-qualifying. Decision and Order at 13; Director's Exhibits 12, 34. Consequently, the administrative law judge's finding that the newly submitted arterial blood gas study evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(2) is affirmed. Inasmuch as there is no evidence of cor pulmonale with right sided congestive heart failure, the administrative law judge also properly found that claimant is precluded from establishing total disability pursuant to 20 C.F.R. §718.204(c)(3). Decision and Order at 13.

In his consideration of the newly submitted medical opinion evidence, the administrative law judge noted that while Dr. Hussain opined that claimant suffered from a totally disabling respiratory impairment, Director's Exhibit 11, Drs. Lane, Fino, Anderson and Broudy opined that claimant retained the respiratory capacity to perform his usual coal mine employment. Decision and Order at 13-14; Director's Exhibits 34, 35 at 35, 35 at 26, 35 at 22; Employer's Exhibits 4, 6, 8. The administrative law judge, therefore, found that claimant had "not proven a change in condition by a preponderance of the evidence." Decision and Order at 14.

We agree with the Director that the administrative law judge erred in failing to provide a basis for crediting the opinions of Drs. Broudy, Fino, Lane and Anderson over that of Dr. Hussain. *See Wojtowicz*, *supra*. Consequently, we vacate the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) and remand the case for further consideration.

Inasmuch as we are unable to affirm the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total disability pursuant to 20 C.F.R. §718.204(c), we remand the case to the administrative law judge for his consideration of whether the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. *See Ross*, *supra*.

Should the administrative law judge, on remand, find the newly submitted evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R.

§725.309, he must consider claimant's 1996 claim on the merits. *See Shupink v. LTV Steel Corp.*, 17 BLR 1-24 (1992).

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
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge