BRB No. 99-0625 BLA

ROBERT C.D. PHILLIPS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: _____)
	)	
EASTERN ASSOCIATED COAL COMPANY	)	
	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION AND ORDER

Party-in-Interest

Appeal of the Decision and Order of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Robert C.D. Phillips, Merritt Island, Florida, *pro se*.

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

PER CURIAM:

Claimant, appearing without the assistance of counsel appeals the Decision and Order (96-BLA-1129) of Administrative Law Judge Stuart A. Levin denying benefits with respect to 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 relevant procedural history of this case is as follows: Claimant filed an application for benefits on June 29, 1973. Director's Exhibit 19. The district director denied this claim on March 27, 1980 on the ground that claimant did not establish any of the elements of entitlement. *Id*. Claimant filed a second claim on May 5, 1983. Director's Exhibit 1. The district director denied the claim in a letter issued on January 13, 1984, as none of the elements of

entitlement was demonstrated. Director's Exhibit 15. The case was then transferred to the Office of Administrative Law Judges (OALJ) for a hearing. After being remanded to the district director and subsequently sent to the Board as a consequence of the Board's decision in *Lukman v. Director, OWCP*, 11 BLR 1-71 (1988), *rev'd Lukman v. Director, OWCP*, 896 F.2d 1248, 13 BLR 2-332 (10th Cir. 1990), the case was eventually returned to the OALJ for a hearing. *Phillips v. Eastern Associated Coal Co.*, BRB No. 89-3409 BLA (Oct. 3, 1990)(unpub.).

In a Decision and Order issued on May 28, 1993, Administrative Law Judge Robert G. Mahony determined that the evidence submitted after the 1980 denial of benefits was insufficient to establish either the existence of pneumoconiosis or total respiratory disability. Judge Mahony concluded, therefore, that claimant failed to demonstrate a material change in conditions pursuant to 20 C.F.R. §725.309 and denied benefits accordingly. Director's Exhibit 77. Claimant appealed to the Board which, citing *Shupink v. LTV Steel Co.*, 17 BLR 1-24 (1992), reversed Judge Mahony's finding under Section 725.309 and remanded the case to the district director so that claimant could obtain a complete pulmonary evaluation. *Phillips v. Eastern Associated Coal Co.*, BRB No. 93-1777 BLA (Feb. 16, 1995)(unpub.).

Following the development of additional medical evidence, the district director determined that claimant did not establish entitlement to benefits. At claimant's request, the case was transferred to the OALJ for a hearing. In a Decision and Order issued on February 25, 1999, Administrative Law Judge Stuart A. Levin (the administrative law judge) considered the evidence submitted subsequent to the 1980 denial of benefits and found that it was insufficient to support a finding of pneumoconiosis under 20 C.F.R. §718.202(a) or a finding of total disability under 20 C.F.R. §718.204(c). Based upon these findings, the administrative law judge determined that a material change in conditions was not established and denied benefits accordingly. Claimant's appeal followed. Neither employer nor the Director, Office of Workers' Compensation Programs, has filed a brief 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). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

As an initial matter, we hold that the administrative law judge indicated correctly that under the standard adopted by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, claimant was required to establish at least one of the elements of entitlement previously adjudicated against him in order to demonstrate a material change in conditions. Decision and Order at 14; *see Lisa Lee Mines v. Director, OWCP* [Rutter], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). Inasmuch as claimant's initial claim was denied because he did not prove that he had pneumoconiosis arising out of coal mine employment or that he was totally disabled due to pneumoconiosis, the administrative law judge properly considered the newly submitted evidence pursuant to Sections 718.202(a) and 718.204(c). *See* Decision and Order at 14-17; *Rutter*, *supra*.

Upon review of the administrative law judge's findings under Section 718.202(a)(1)-(4), we affirm the administrative law judge's determination that claimant did not establish a material change in conditions regarding the existence of pneumoconiosis, as it is rational and supported by substantial evidence. Under Section 718.202(a)(1), the administrative law judge acted within his discretion in determining that the newly submitted x-ray evidence was insufficient to support a finding of pneumoconiosis, as all of the physicians who are both Board-certified radiologists and B readers proffered negative readings. Decision and Order at 15; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). Proof of the existence of pneumoconiosis pursuant to Section 718.202(a)(2) and (a)(3) is not available in the present case, as the record does not contain any biopsy evidence or evidence of complicated pneumoconiosis and the relevant claim was filed by a living miner after January 1, 1982. *See* 20 C.F.R. §§718.202(a)(2), (a)(3), 718.304-306.

With respect to Section 718.202(a)(4), the administrative law judge rationally determined that the numerous references to pneumoconiosis in claimant's hospital records are insufficient to establish the existence of the disease on the ground that they reflected a recitation of claimant's medical history and did not identify the documentation underlying the references. Decision and Order at 15; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985). The administrative law judge also acted within his discretion in discrediting the two documented medical opinions which contain a diagnosis of pneumoconiosis. The administrative law

judge rationally determined that the opinion of Dr. Brodnan, claimant's treating physician, was entitled to little weight, as Dr. Brodnan did not provide an explanation of his diagnosis nor did the x-ray readings or CT scan interpretations to which he referred contain any mention of pneumoconiosis. *Id*.; Director's Exhibit 86; *see Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994). With respect to Dr. Swamy's opinion, the administrative law judge acted within his discretion in determining that Dr. Swamy's diagnosis of pneumoconiosis was not supported by the underlying documentation in light of the fact that the x-ray upon which he relied in diagnosing clinical pneumoconiosis was read as negative for pneumoconiosis by seven dually qualified physicians and the validity of the remaining objective data obtained by Dr. Swamy was questioned by reviewing physicians with superior qualifications. Decision and Order at 16; Director's Exhibits 9, 11, 38; Employer's Exhibit 2; *see Clark*, *supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). Thus, the administrative law judge's finding that the newly submitted evidence relevant was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4) is rational and supported by substantial evidence and is affirmed.

Regarding the issue of total disability, under Section 718.204(c)(2), the administrative law judge acted within his discretion in determining that the single qualifying blood gas study was did not support a finding of total disability on the ground that Dr. Kraman, who is Board-certified in Internal Medicine and Pulmonary Disease, reviewed the study and deemed it invalid. Decision and Order at 16; Director's Exhibit 8; *see generally Orek v. Director, OWCP*, 10 BLR 1-51 (1987). In addition, the administrative law judge correctly determined that total disability could not be proven under Section 718.204(c)(3), as the record contains no evidence of cor pulmonale with right sided congestive heart failure. *Id*.

Under Section 718.204(c)(4), the administrative law judge considered all of the newly submitted medical opinions and determined correctly that Drs. Brodnan and Villarubia are the only physicians who stated that claimant is suffering from a totally disabling respiratory or pulmonary impairment. The administrative law judge rationally found that these opinions were entitled to little weight on the ground that the physicians did not set forth the data supporting their conclusions. Decision and Order at 16-17; *see Clark*, *supra*; *Peskie*, *supra*. We affirm, therefore, the administrative law judge's finding that claimant has not established total disability under Section 718.204(c)(4).

Under Section 718.204(c)(1), however, the administrative law judge's determination that the pulmonary function study evidence is in equipoise is not supported by substantial evidence. Four of the newly submitted studies produced qualifying results when compared to the values set forth in the table appearing in Appendix B to 20 C.F.R. Part 718. Director's Exhibits 68, 87. The administrative law judge acted within his discretion in treating the qualifying studies obtained on March 1, 1990 and June 18, 1992 as insufficient to prove total respiratory disability, as the administering technicians deemed claimant's effort inadequate and the results unreliable. *Id*.; *see Orek*, *supra*, *Siegel*, *supra*. One study, which the administrative law judge treated as valid and qualifying, was obtained when claimant was 74 years old and produced results below the table values for a 71 year old man. Employer's Exhibit 4. The administrative law judge concluded that inasmuch as this study, dated January 26, 1998, was performed by claimant on the same day as a nonqualifying test produced after inhaling bronchodilators, the pulmonary function study evidence was in equipoise and, therefore, did not establish total respiratory disability. Decision and Order at 16.

However, the administrative law judge's statement that claimant's pulmonary function studies did not exhibit qualifying values until January 26, 1998, is incorrect. *Id*. The record contains a qualifying study obtained on June 2, 1989, which the administrative law judge did not explicitly address. Director's Exhibit 67. Inasmuch as the apparent omission of this study, the validity of which has not been questioned, may have affected the administrative law judge's determination that the newly submitted pulmonary function study evidence is in equipoise, we must vacate the administrative law judge's finding under Section 718.204(c)(1) and his finding that claimant failed to prove a material change in conditions under Section 725.309 and remand the case to the administrative law judge for reconsideration. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). On remand, the administrative law judge must identify the evidence that he is considering and set forth his findings with respect to this evidence in detail. *See Robertson v. Alabama By-Products Corp.*, 7 BLR 1-793 (1985); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984); *Seese v. Keystone Coal Mining Corp.*, 6 BLR 1-149 (1983). If the administrative law judge determines that total disability has been established pursuant to Section 718.204(c)(1), he must weigh the evidence supportive of a finding of total disability against the contrary probative evidence to determine if claimant has established total disability under Section 718.204(c)(1)-(4). *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986). Finally, should the administrative law judge find that claimant has established a material change in conditions, he must consider entitlement on the merits under Part 718 in light of a weighing of all of the evidence of record. *See Rutter*, *supra*.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part, vacated in part, and remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge