BRB No. 02-0667 BLA

MARGARET PILLOW (Widow of JOHN PILLOW)	)	
Claimant-Petitioner	)	
v.	)	
PEABODY COAL COMPANY	)	DATE ISSUED:
and	)	
OLD REPUBLIC INSURANCE COMPANY	)	
Employer/Carrier- Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Mary Forrest-Doyle (Howard Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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, McGRANERY and HALL, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Claimant[1] appeals the Decision and Order (00-BLA-0225) of Administrative Law Judge Robert L. Hillyard denying benefits on claims 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] The instant case involves a duplicate miner's claim filed on May 21, 1996[3] and a survivor's claim filed on February 2, 1999. The administrative law judge found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and was, therefore, insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[4] The

[1]Claimant is the surviving spouse of the deceased miner who died on November 27, 1998. Director's Exhibit 52.

[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]The relevant procedural history of the instant case is as follows: The miner initially filed a claim for benefits on June 20, 1979. Director's Exhibit 29-767. In a Decision and Order dated February 29, 1984, Administrative Law Judge Charles W. Campbell found that the evidence was insufficient to establish either the existence of pneumoconiosis or that the miner's respiratory impairment arose out of his coal mine employment. Accordingly, Judge Campbell denied benefits. Director's Exhibit 29-223.

Claimant filed a second claim on November 5, 1984. Director's Exhibit 29-763. Since claimant's 1984 claim was filed within one year of the issuance of the last denial of his 1979 claim, the 1984 claim constituted a timely request for modification of the 1979 claim. *See Stanley v. Betty B Coal Co.*, 13 BLR 1-72 (1990). In a Decision and Order dated February 12, 1988, Administrative Law Judge Aaron Silverman denied the miner's request for modification. Director's Exhibit 29-108. There is no indication that the miner took any further action in regard to his 1979 claim.

Claimant filed a third claim on May 21, 1996. Director's Exhibit 1.

[4]Although Section 725.309 has been revised, these revisions only apply to claims filed after January 19, 2001.

administrative law judge, thus, denied benefits in the miner's claim. In his adjudication of the survivor's claim, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis. Assuming *arguendo* that the evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge also denied benefits in the survivor's claim. On appeal, claimant contends that the miner was not provided with a full and complete pulmonary evaluation. Claimant also argues that the administrative law judge erred in finding the evidence insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Claimant further contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, contending, *inter alia*, that the Department of Labor provided the miner with a complete and credible pulmonary examination. The Director, however, argues that the administrative law judge erred by failing to determine whether claimant established a material change in conditions with regard to the element of total respiratory disability.

The Board 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).

Section 725.309 (2000) provides that a duplicate claim is subject to automatic denial on the basis of the prior denial, unless there is a determination of a material change in conditions since the denial of the prior claim. 20 C.F.R. §725.309(d) (2000). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction the instant 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, 19 BLR 2-10 (6th Cir. 1994).

Administrative Law Judge Charles W. Campbell adjudicated the miner's 1979 claim under the Part 410, Subpart D regulations. Director's Exhibit 29-223. Judge Campbell found that "the weight of the evidence fail[ed] to show that the [miner] ha[d] pneumoconiosis or that his respiratory impairment arose out of coal mine employment." *Id.* Judge Campbell, therefore, denied benefits.

The miner subsequently requested modification of his denied claim. In a Decision and

Order dated February 12, 1988, Administrative Law Judge Aaron Silverman found that the x-ray evidence was "still insufficient to establish the existence of pneumoconiosis." Director's Exhibit 29-108. Judge Silverman also found that two newly submitted pulmonary function studies were invalid. *Id.* Judge Silverman, therefore, found that the "evidence [was] insufficient to establish that the [miner's] condition has changed to a degree that would warrant an award of benefits." *Id.* Consequently, Judge Silverman denied the miner's request for modification.

In regard to the administrative law judge's consideration of whether the newly submitted evidence is sufficient to establish the existence of pneumoconiosis, we initially note that no party challenges 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)(1)-(3). Consequently, these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 25-26.

Claimant, however, contends that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant argues that in considering whether the newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge erred in considering the opinions of Drs. Branscomb, Caffrey and Fino because their opinions were based, at least in part, upon previously submitted medical evidence. Claimant's Brief at 10. This contention is without merit because it is a common and wise practice for physicians to review past medical histories, reports, and objective test results in assessing a miner's current condition. In the instant case, although Drs. Branscomb, Caffrey and Fino reviewed previously submitted evidence, they also reviewed medical evidence developed subsequent to the final denial of the miner's 1979 claim. *See* Employer's Exhibits 3-5. The administrative law judge, therefore, properly considered the reports of Drs. Branscomb, Caffrey and Fino as newly submitted medical opinion evidence.

Claimant next contends that the administrative law judge erred in crediting the opinions of Drs. Selby, Branscomb, Caffrey and Fino that the miner did not suffer from pneumoconiosis, over Dr. Simpao's contrary opinion. Although claimant does not attempt to demonstrate that the opinions of Drs. Selby, Branscomb, Caffrey and Fino are not sufficiently reasoned, she contends that the administrative law judge failed to adequately address the issue. Whether a medical report is sufficiently reasoned is for the administrative law judge as the fact-finder to decide. *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). Implicit in an administrative law judge's reliance upon a particular physician's opinion is a finding that the opinion is reasoned. *See Pulliam v. Drummond Coal Co.*, 7 BLR

1-846 (1985). Because Drs. Selby,[5] Branscomb,[6] Caffrey[7] and Fino[8] provided explanations

[5]Based upon the miner's history, physical examination, and laboratory data, Dr. Selby opined that the miner did not suffer from coal workers' pneumoconiosis or any respiratory or pulmonary disease caused by his coal mine employment. Director's Exhibit 34. Although Dr. Simpao noted that metastatic carcinoma should be ruled out due to multiple nodules throughout both lung fields, Dr. Selby noted, *inter alia*, that the miner's September 11, 1997 x-ray was negative for pneumoconiosis. *Id.*

[6]Based upon a comprehensive review of the medical evidence, Dr. Branscomb opined that there was no medical evidence of coal workers' pneumoconiosis or any pulmonary disease caused or aggravated by the miner's coal dust exposure. Employer's Exhibit 3. Dr. Branscomb explained that the x-ray evidence did not support a diagnosis of coal workers' pneumoconiosis, but instead revealed the "rapid growth of multiple metastatic cancers in the lungs." *Id.*

for their respective opinions that the miner did not suffer from pneumoconiosis, the administrative law judge properly relied upon their opinions as reasoned.

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[7]Based upon a comprehensive review of the medical evidence, Dr. Caffrey opined that the miner did not have coal workers' pneumoconiosis or any other occupational lung disease associated with his coal dust exposure. Employer's Exhibit 4. Dr. Caffrey noted, *inter alia*, that only one of the seventeen x-ray interpretations that he reviewed was positive for pneumoconiosis. *Id.*

[8]Based upon a comprehensive review of the evidence, Dr. Fino opined that there was insufficient objective medical evidence to justify a diagnosis of coal workers' pneumoconiosis. Employer's Exhibit 5. Dr. Fino also opined that the miner did not suffer from an occupationally acquired pulmonary condition. *Id.* Dr. Fino explained that his opinion was based upon several factors, including the fact that the majority of the miner's chest x-ray interpretations were negative for pneumoconiosis and the fact that the miner's diffusing capacity values were normal. *Id.*

In his consideration of whether the newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge found that the opinions of Drs. Selby, Branscomb, Caffrey and Fino, that the miner did not suffer from pneumoconiosis, were entitled to greater weight than the contrary opinions of Drs. Traughber and Simpao, based upon the doctors' qualifications.[9] *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order at 10. Inasmuch as it is based upon substantial evidence, we affirm 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).

Claimant contends that because the administrative law judge did not accept Dr. Simpao's diagnosis of pneumoconiosis, the Department of Labor failed to provide the miner with a complete and credible pulmonary examination as required under the Act. We, however, agree with the Director that claimant's argument is without merit. While the Department of Labor is required to provide a miner with a complete, credible pulmonary evaluation, *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990) (*en banc*), the Department of Labor is not obligated to provide a miner with a finding that he suffers from pneumoconiosis. Although Dr. Simpao's opinion was ultimately found to be outweighed by other evidence of record, Dr. Simpao addressed all of the elements of entitlement and his opinion was not internally flawed. We, therefore, hold that the Department of Labor provided the miner with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *see Newman*, *supra*; *Pettry*, *supra*.

We also agree with the Director that, in his current consideration of whether the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), the administrative law judge should have addressed whether the newly submitted evidence is sufficient to establish the existence of a total respiratory disability after he determined that this evidence was insufficient to establish the existence of pneumoconiosis because, in denying the miner's request for modification, Judge Silverman had found that the miner failed to establish both the existence of pneumoconiosis and total pulmonary disability. *See* Director's Brief at 5. In *Ross*, *supra*, the Sixth Circuit directed administrative law judges that in determining whether a material change in conditions has

[9]Drs. Selby and Fino are Board-certified in Internal Medicine and Pulmonary Disease. Director's Exhibit 34; Employer's Exhibit 5. Dr. Branscomb is Board-certified in Internal Medicine. Employer's Exhibit 3. Dr. Caffrey is Board-certified in Anatomical and Clinical Pathology. Employer's Exhibit 4. The qualifications of Drs. Traughber and Simpao are not found in the record.

been established, they "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." *Ross*, 42 F.3d at 997, 19 BLR at 2-18 (emphasis added).

Accordingly, although the administrative law judge properly found that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis, we must vacate the administrative law judge's finding that the evidence is insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000) in light of his failure to address whether the newly submitted evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b).[10] On remand, the administrative law judge is instructed to address whether the newly submitted evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b),[11] thereby establishing a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (*en banc*).

Should the administrative law judge, on remand, find the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), he should consider the miner's 1996 claim on the merits. *See Shupink v. LTV Steel Corp.*, 17 BLR 1-24 (1992).

[10]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now set out at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

[11]We note that the administrative law judge, in summarizing the newly submitted objective evidence, did not list the results of a pulmonary function study and an arterial blood gas study conducted on September 11, 1997. *See* Director's Exhibit 34.

We now turn our attention to claimant's survivor's claim. Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Because the instant survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).[12] *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence is sufficient to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

Claimant contends that Dr. Simpao's opinion and the miner's death certificate are sufficient to establish that the miner's death was due to pneumoconiosis. We disagree. The administrative law judge properly found that there was no medical evidence supportive of a finding that the miner's death was due to pneumoconiosis. Decision and Order at 30-31. Dr. Simpao did not address the cause of the miner's death. *See* Director's Exhibit 41. Dr. Lineberry completed the miner's death certificate. Dr. Lineberry attributed the miner's death to an "acute myocardial infarction/CAD," "diffusely metastatic renal cell cancer," IDDM, and COPD. Director's Exhibit 52. Because Dr. Lineberry did not attribute any of the listed causes of death to the miner's coal dust exposure, the miner's death certificate is insufficient

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[12]Section 718.205(c) provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

> (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
> (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
> (3) Where the presumption set forth at §718.304 is applicable.
> (4) However, survivors are not eligible for benefits where the miner's death was caused by traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.
> (5) Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death.

20 C.F.R. §718.205(c).

to support a finding that the miner's death was due to pneumoconiosis. Drs. Branscomb, Caffrey and Fino, the only other physicians to address the cause of the miner's death, opined that the miner's death was not due to pneumoconiosis.[13] Employer's Exhibits 3-5. Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that the medical evidence is insufficient to establish that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §718.205(c); *Brown, supra*.

[13]Dr. Branscomb opined that the miner's death was not in any way caused, aggravated, or accelerated by, his coal dust exposure. Employer's Exhibit 3. Dr. Caffrey opined that the miner's coal dust exposure did not cause, contribute to, or hasten his death. Employer's Exhibit 4. Dr. Fino further opined that coal mine dust inhalation neither caused, contributed to, nor hastened the miner's death. Employer's Exhibit 5.

Accordingly, the administrative law judge's denial of benefits in the survivor's claim is affirmed. The administrative law judge's decision denying benefits in the miner's claim is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur.

BETTY JEAN HALL
Administrative Appeals Judge

DOLDER, Chief Administrative Appeals Judge, concurring and dissenting:

While I concur with my colleagues that the administrative law judge properly found that claimant failed to establish entitlement in the survivor's claim, I cannot agree with their decision to accept the Director's argument that the case must be remanded for further material change findings in the miner's claim. The administrative law judge properly considered the new evidence, favorable and unfavorable, and found that the new evidence did not establish either the existence of pneumoconiosis or a totally disabling respiratory impairment due to pneumoconiosis.[14] Thus, I would affirm the administrative law judge in all respects. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

NANCY S. DOLDER, Chief
Administrative Appeals Judge

[14] "To establish eligibility for benefits under [20 C.F.R.] Part 718, a claimant must prove (1) that he suffers from pneumoconiosis; (2) that his pneumoconiosis arose at least in part out of his coal mine employment; and (3) that he is totally disabled by pneumoconiosis." *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1039, 17 BLR 2-16, 2-20 (6th Cir. 1993).