BRB No. 97-1000 BLA

IKIE BRYANT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ARCH OF WEST VIRGINIA DIVISION, APOGEE 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 - Denying Modification and Denying Claim for Benefits of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Ikie Bryant, Logan, West Virginia, *pro se*.

Mary Rich Malloy (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant, proceeding without the assistance of counsel, appeals the Decision and Order - Denying Modification and Denying Claim for Benefits (95-BLA-1425) of Administrative Law Judge Mollie W. Neal, 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). This claim, filed on December 10, 1993, is a duplicate claim.[1] After

[1]The relevant procedural history of this case is as follows: Claimant filed his initial claim for Black Lung benefits with the Social Security Administration on May 7, 1973. Director's

crediting claimant with eight and one- third years of coal mine employment, the administrative law judge noted that claimant had established the existence of pneumoconiosis in his previous claim. The administrative law judge then assessed the newly submitted evidence of record, and found it insufficient to establish that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203. The administrative law judge also found that the newly submitted evidence failed to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c), or total disability causation pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge found that claimant failed to establish a material change in conditions under 20 C.F.R. §725.309, and denied benefits. Employer responds to claimant's appeal, arguing that the administrative law judge's decision is supported by substantial evidence and should be affirmed. The Director, Office of Workers' Compensation Programs, has not filed a brief is this appeal.

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. *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).

In order to establish entitlement to benefits under Part 718 in a living miner's claim,

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Exhibit 29. That claim was finally denied by an Order of the Benefits Review Board on December 7, 1992. *Bryant v. Arch of West Virginia,* BRB No. 91-2199 BLA (Order on Motion For Reconsideration, December 7, 1992)(unpub.); Director's Exhibit 30. Claimant filed the instant claim, a duplicate claim, on December 10, 1993. Director's Exhibit 1. The claim was denied by the district director on May 16, 1994, and again on December 21, 1994. Director's Exhibits 19, 27. On December 29, 1994, claimant requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 28. Administrative Law Judge Mollie W. Neal conducted a hearing on the claim in Madison, West Virginia, on October 24, 1996. Decision and Order at 4; Hearing Transcript at 1. Judge Neal issued her decision on March 28, 1997.

claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Initially, pursuant to the decision of the United States Court of Appeals for the Fourth Circuit, under whose jurisdiction this case arises, in *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), we hold that the administrative law judge properly noted the previous finding of the existence of pneumoconiosis, *see Rutter, supra at* 1363, 2-237; Decision and Order at 8-9, and then examined the newly submitted evidence under Sections 718.203, 718.204(b) and (c), to determine whether claimant could establish one of these elements of entitlement previously adjudicated against him. *See* Decision and Order at 7-13. The administrative law judge weighed the newly submitted evidence under each section, and determined that the weight of the evidence failed to establish each of these elements. She therefore denied the duplicate claim under Section 725.309.

The administrative law judge found that the newly submitted medical opinion evidence failed to establish that claimant's pneumoconiosis arose out of coal mine employment under 20 C.F.R. §718.203(c). We hold that the administrative law judge, within the bounds of her discretion, permissibly discredited the opinions of Drs. Rao and Ranavaya, both of whom connected claimant's pneumoconiosis to his coal mine employment, because she found the opinions undocumented and unreliable. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1988); Decision and Order at 9-10. She properly found, therefore, that claimant failed to carry his burden of proof to establish the etiology of his pneumoconiosis under 20 C.F.R. §718.203. *See Kuchwara v. Director, OWCP,* 7 BLR 1-167 (1984). We consequently affirm her finding that claimant failed to establish a material change in conditions at Section 718.203.

Turning to the administrative law judge's findings under Section 718.204(c)(1)-(3), we initially affirm her findings that all of the newly submitted objective studies were non-qualifying[2] under subsections (c)(1) and (c)(2). Additionally, we affirm the administrative law judge's finding that the record is devoid of evidence of cor pulmonale under subsection (c)(3).

Under Section 718.204(c)(4), the administrative law judge found that the newly submitted medical opinion evidence failed to establish total disability. For the reasons discussed below, we vacate the administrative law judge's findings under this subsection.

[2]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable values delineated in the tables at 20 C.F.R. 718, Appendix B, C, respectively. A "nonqualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

Initially, the administrative law judge held that Drs. Zaldivar and Altmeyer did not offer opinions regarding disability. Decision and Order at 12. This statement is incorrect; both doctors diagnosed total respiratory disability, but assigned the cause of claimant's problems to his cigarette smoking habit and his heart disease. *See* Employer's Exhibits 4, 5.[3] In evaluating the record, the administrative law judge's evidentiary analysis must coincide with the evidence of record. *See Johnson v. Califano*, 585 F.2d 89, 90 (4th Cir. 1978); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *McCune v. Central Appalachian Coal Co.,* 6 BLR 1-996 (1984). Accordingly, we must remand this case for the administrative law judge to reconsider these opinions.

[3]Under Section 718.204(c), the cause of claimant's disability is not at issue; the only question to be answered is whether a totally disabling respiratory or pulmonary impairment exists. *See* 20 C.F.R. § 718.204(c); *Tuner v. Freeman United Coal Co.,* 10 BLR 1-85 (1987); *see also Robinson v. Pickands Mather and Co.,* 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

Furthermore, in finding no total disability under 718.204(c)(4), the administrative law judge discredited Dr. Rao's opinion of moderate to severe impairment, because the doctor "did not indicate that Claimant would be unable to perform his usual coal mine employment," and because "it was not evident from the record that he considered the physical demands of Claimant's job." Decision and Order at 12. The administrative law judge then noted that claimant testified that his job as a shuttle car operator did not require lifting. *Id*. She therefore concluded that because the doctor "made no mention of how Claimant would be limited by his respiratory impairment, there was no reasonable basis to support a finding that the degree of Claimant's lung impairment reported by Dr. Rao is, in fact, totally disabling." *Id*. Although the administrative law judge attempted to compare the physical requirements of claimant's usual coal mine employment with Dr. Rao's physical assessment, the administrative law judge's terse finding that claimant's usual coal mine employment "did not require lifting," is insufficient under the Administrative Procedure Act (APA). *See* 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). The primary focus of the administrative law judge's holding was that Dr. Rao did not diagnose total disability. However, as she herself recognized, it is the administrative law judge's responsibility to compare the physical requirement of claimant's usual coal mine employment with the physician's assessment of his work capability in order to determine whether a medical opinion is tantamount to a finding of total disability. *See Parson v. Black Diamond Coal Co.,* 7 BLR 1-236 (1984); *see also McMath v. Director, OWCP,* 12 BLR 1-6 (1988). Under *McMath,* the administrative law judge is required to determine whether the exertional requirements of claimant's usual coal mine employment are "sufficiently set forth in the record so as to allow a comparison." If they are, the administrative law judge may compare them with the doctor's diagnosis. On the record before us, we cannot discern whether the administrative law judge has complied with the requirement set forth in *McMath*. On remand, therefore, the administrative law judge must analyze the record to determine whether it affords a permissible basis upon which to compare Dr. Rao's diagnosis of a moderate to severe impairment with the physical demands of claimant's usual coal mine employment as a shuttle car operator. *See McMath, supra; see also Parson, supra.*[4] The administrative law judge's finding that the medical opinion evidence fails to establish the existence of a totally disabling respiratory or pulmonary impairment under Section 718.204(c)(4) is therefore vacated.

Turning to Section 718.204(b), we note that the administrative law judge's finding that claimant failed to establish total disability causation was based on her finding that

[4]We note, however, that the administrative law judge properly discredited Dr. Ranavaya's opinion because it was partially based on a pulmonary function study of "questionable validity." *See Baker v. North American Coal Co.,* 7 BLR 1-79 (1984); Decision and Order at 12.

claimant failed to establish total disability under Section 718.204(c). *See* Decision and Order at 13. In light of our decision to vacate the administrative law judge's findings at Section 718.204(c), her findings at Section 718.204(b) are likewise vacated.

Consequently, we vacate the administrative law judge's holding that claimant failed to establish a material change in conditions under 20 C.F.R. §725.309. *See Rutter, supra*. On remand, the administrative law judge must reweigh the newly submitted evidence under Section 718.204(c) and (b). If she finds an element of entitlement previously adjudicated against claimant now established, she must find a material change in conditions under Section 725.309. *See Rutter, supra* at 1363, 2-237. If the administrative law judge finds a material change in conditions established under Section 725.309, she must reweigh all of the evidence of record and render a determination of entitlement on the merits. *See Rutter*, *supra;* 20 C.F.R. §725.309.

Accordingly, the administrative law judge's Decision and Order - Denying Modification and Denying Benefits is affirmed in part and vacated in part, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge