BRB No. 97-1038 BLA

GEORGE C. LOONEY, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
GRAPEVINE COAL COMPANY, INCORPORATED	)	
	)	
	)	
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 Remand of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

George C. Looney, Jr., Grundy, Virginia, *pro se*.[1]

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

[1]Tim White, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested on behalf of claimant that the Board review the administrative law judge's decision. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand (95-BLA-0032) of Administrative Law Judge C. Richard Avery 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). This case is before the Board for the second time. In the original Decision and Order, Administrative Law Judge Reno Bonfanti adjudicated this duplicate claim[2] pursuant to the regulations contained in 20 C.F.R. Part 718 and found the evidence insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Judge Bonfanti also found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, Judge Bonfanti denied benefits. In addition, Judge Bonfanti found that claimant's most recent employer, Lane Hollow Coal Company, was financially incapable of assuming liability for benefits, and he dismissed the next most recent employer, Grapevine Coal Company, as a party in the case because Lane Hollow Coal Company was not Grapevine Coal Company's successor operator. Hence, Judge Bonfanti transferred liability to the Black Lung Disability Trust Fund. In response to claimant's appeal, the Board vacated Judge Bonfanti's finding that the evidence is insufficient to establish a material change in conditions at 20 C.F.R. §725.309, and remanded the case to him to apply *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). While the Board affirmed Judge Bonfanti's findings at 20 C.F.R. §718.202(a)(1)-(3), the Board vacated his finding at 20 C.F.R. §718.202(a)(4), and remanded the case for re-evaluation of Dr. Patel's opinion. The Board also vacated Judge Bonfanti's dismissal of Grapevine Coal Company as a potential responsible operator, and instructed him to consider the issue of responsible operator in accordance with *Director, OWCP v. Trace Fork Coal Co.* [Matney], 67 F.3d 503, 19 BLR 2-290 (4th Cir. 1995), if reached. *Looney v. Grapevine Coal Co.*, BRB Nos. 95-1873 BLA and 95-1873 BLA-A (July 15, 1996)(unpub.).

On remand, the case was reassigned to Administrative Law Judge C. Richard Avery (the administrative law judge) who found the newly submitted evidence insufficient 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). Consequently, the administrative law judge concluded that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order on

[2]Claimant filed his initial claim on May 5, 1978. Director's Exhibit 41. This claim was denied by the Department of Labor (DOL) on July 9, 1979. *Id*. Although the DOL's denial indicates that claimant's failure to establish total disability due to pneumoconiosis was the basis for the denial, the DOL's attached Guide for Submitting Additional Evidence indicates that claimant needed to provide medical evidence to prove the existence of pneumoconiosis. *Id*. Inasmuch as claimant did not pursue this claim any further, the denial became final. Claimant filed his most recent claim on May 14, 1993. Director's Exhibit 1.

Remand. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *See 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 on Remand 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After considering the newly submitted evidence, the administrative law judge found that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309. The administrative law judge correctly stated that "Claimant's last claim was denied because he did not establish any of the elements of entitlement." Decision and Order on Remand at 3; *see* Director's Exhibit 41. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, adopted a standard whereby an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him, and thereby has established a material change in conditions pursuant to 20 C.F.R. §725.309(d). *See Rutter, supra*.

Initially, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Whereas Drs. Forehand and Shoukry opined that claimant does not suffer from pneumoconiosis,[3] Director's Exhibits 18, 35, Dr. Patel opined that claimant probably has coal workers' pneumoconiosis, Director's Exhibit 34. The administrative law judge properly discounted the opinion of Dr. Patel because he found Dr. Patel's opinion to be equivocal,[4] *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987), and based on an inaccurate coal mine employment history,[5] *see Hunt v. Director, OWCP*, 7 BLR 1-709

[3]In a report dated June 15, 1993, Dr. Forehand diagnosed a reversible airflow obstruction and a pulmonary nodule related to coal dust exposure and cigarette smoking. Director's Exhibit 16. However, in a subsequent report dated September 14, 1993, Dr. Forehand opined that claimant does not suffer from an airflow obstruction or any other findings that have arisen from coal mine employment. Director's Exhibit 18. Dr. Shoukry opined that claimant does not suffer from coal workers' pneumoconiosis. Director's Exhibit 35.

[4]The administrative law judge observed that "Dr. Patel stated that Claimant '**may have** moderate ventilatory impairment, and...[claimant] **probably** also has CWP.'" Decision and Order on Remand at 3 (emphasis added).

[5]The administrative law judge stated that Dr. Patel "used a coal mine employment

(1985). Thus, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

work history in excess of that claimed by the Claimant." Decision and Order on Remand at 3.

With regard to 20 C.F.R. §718.204(c), the administrative law judge considered all of the relevant newly submitted evidence of record and found the evidence insufficient to establish total disability. The administrative law judge stated that "[n]one of the valid pulmonary function studies or blood gas studies suggest total disability."[6] Decision and Order on Remand at 3. The administrative law judge also correctly stated that "[t]here is no evidence of cor pulmonale with right sided congestive heart failure." *Id*. Further, the administrative law judge correctly found that "the new reports, including Dr. Patel's, do not support a finding of total respiratory disability."[7] Decision and Order on Remand at 3; s*ee Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1991). Thus, substantial evidence supports the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987). Moreover, since claimant failed to establish either the existence of pneumoconiosis or total disability, the administrative law judge properly concluded that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309. *See Rutter*, *supra*.

[6]Of the four newly submitted pulmonary function studies of record, three studies yielded non-qualifying values before and after bronchodilators, Director's Exhibits 15, 35, 37, and one study dated June 15, 1993 yielded qualifying values before administering a bronchodilator and non-qualifying post-bronchodilator values, Director's Exhibit 13. Whereas Dr. Levinson opined that the June 15, 1993 study is valid, Dr. Michos opined that this study is invalid. Director's Exhibit 14. The administrative law judge appears to have relied on Dr. Michos' invalidation of this study. Decision and Order on Remand at 3. Although the administrative law judge should have provided a reason for according determinative weight to the invalidation report of Dr. Michos, a consulting physician, over the administering physician, this error is harmless since the preponderance of the pulmonary function study evidence yielded non-qualifying values. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[7]Dr. Forehand opined that claimant does not suffer from a pulmonary impairment. Director's Exhibit 18. Dr. Shoukry opined that claimant suffers from shortness of breath due to chronic obstructive pulmonary disease. Director's Exhibit 35. Lastly, Dr. Patel opined that claimant "**may have** moderate ventilatory impairment." Director's Exhibit 34 (emphasis added). As previously noted, the administrative law judge properly found Dr. Patel's opinion to be equivocal. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge